

# Housing Learning & Improvement Network

## Housing Provision and the Mental Capacity Act 2005

This fact sheet and accompanying suite of information sheets are intended to offer information about the law in relation to those likely to lack capacity concerning arrangements for housing. It is meant as a general guide and care should be taken to obtain specific legal advice prior to initiating legal proceedings or taking significant steps.

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## Introduction

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## 1 WHAT THE ACT DOES

- It provides a statutory framework to strengthen the position of - yet also protect - adults who may lack capacity to make some decisions for themselves, for example people with dementia, learning difficulties or mental health problems.
- It enables capacitated people to plan for a time when they may lack capacity and clarifies who can take decisions, in what situations, and how to go about it.
- It is due to come into force in the main in October 2007; however from 1<sup>st</sup> April 2007 a new independent advocacy service will exist for those who lack capacity, facing proposed long-term state arranged accommodation if they are “unbefriended”. In addition, from April 2007 there will be two new criminal offences of ill treatment or wilful neglect.
- The Code of Practice accompanying it has now been published. The Code provides guidance as to how the Act must be implemented and section 42 of the Act requires that those acting in a professional capacity to have regard to the Code of Practice. It may not always be possible to act as instructed by the Code. Where practitioners feel compelled to depart from the Code, provided that they have considered the advice within it, they will not necessarily get into trouble where they are able to justify taking a different approach.
- The Act is relevant to everyone who supports or cares for – whether formally or informally – people who may lack capacity to make decisions for themselves. This includes the housing and housing-related support sectors, so it is important for professionals and managers from these sectors to be familiar with the main provisions of the Act.

## 2 FIVE KEY PRINCIPLES

- **A presumption of capacity** – every adult has the right to make his or her own decisions and must be assumed to have capacity to do so, unless it is proved otherwise
- **Supporting individuals to make their own decisions** – a person must be given all practicable help before anyone treats them as not being able to make their own decisions
- **Unwise decisions** – just because an individual makes what might be seen as an unwise decision, they should not be assumed to lack capacity to make that decision
- **Best Interests** – an act done or decision made under the Act for or on behalf of a person who lacks capacity must be done in their best interests
- **Least restrictive option** – anything done for or on behalf of a person who lacks capacity should only be done after considering if there is another option that is less restrictive of their basic rights and freedoms

### **3 MEANING OF CAPACITY**

A person who lacks capacity is “a person who lacks capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken.”

- It is not a single, absolute state. So the notion of bringing in a psychiatrist to pronounce on somebody’s “capacity” is inappropriate.
- It is decision-specific – so for example someone might well have the capacity to decide what they’d like for breakfast but not to sign a tenancy agreement
- It is time-specific – people with certain conditions fluctuate in their level of mental functioning, eg. those with a dementia - so whether or not they have capacity to make a particular decision can only be assessed at the time they are being asked to make the decision.
- No one can be labelled incompetent or incapacitated simply because they have a particular diagnosis or medical condition.

### **4 TEST OF CAPACITY**

The test for incapacity is two fold. Firstly, whether there is an impairment or a disturbance in the functioning of the mind or brain. There is no requirement for a formal diagnosis and the impairment/ disturbance does not have to be permanent. Second, if there appears to be an impairment or disturbance then it would be necessary to consider whether this impairment or disturbance would prevent the person from making a particular decision. The test for whether a person is incapacitated in relation to making a particular decision is in four stages, namely:

1. Can the person absorb basic information about the pros and cons of an issue, simply communicated?
2. Can the person retain the information for long enough to process it?
3. Can the person be said, objectively, to be weighing up the pros and cons against their own (subjective) value system, and arriving at a decision?
4. Can they communicate their decision somehow?

If there is evidence, on the balance of probabilities (i.e. it is more likely than not) that the person cannot manage one or more of the four stages, then they no longer retain the presumption of capacity on that issue.

In that scenario, their “decision” is merely a preference, and if, in acting upon it, the person comes to harm which could have been anticipated, those with a duty to care could be deemed negligent if they simply went along with the “decision”.

There is a new criminal offence introduced in the Act of ill-treatment or wilful neglect which applies to someone who has care of, is a donee under a Lasting Power of Attorney (LPA) or an Enduring Power, or is a court-appointed deputy for, someone who lacks capacity.

## 5 WHO ASSESSES CAPACITY, AT LEAST INITIALLY?

In any given situation, it is the 'decision maker' who must decide on a person's capacity. The 'decision maker' is the person who, if the person lacks capacity, would be doing wrong by going ahead, or who would need the cloak of legal protection provided by the Act, to protect them from liability for doing what they propose doing, without the consent of the person in question. Therefore, it depends entirely on the nature and context of the decision. For example:

- A solicitor, if asked for advice, must decide if someone has capacity to grant Power of Attorney over their affairs to another person or make a will.
- A surgeon must decide if someone has sufficient capacity to provide informed consent for an operation.
- The local authority is the 'decision maker' in relation to mental capacity to participate in care planning and the question of delivery of care plans.
- The care provider must decide in the first instance whether someone's consistent refusal to get out of bed in the morning is a capacitated decision, even if it subsequently becomes an issue for the body which drew up the care plan.

Everybody who works with people who may lack capacity has a responsibility to assess capacity in the given context. Without such an assessment anyone carrying out tasks on behalf of another would be unable to consider whether what they were doing to or for the individual was lawful.

If in doubt, it is advisable to refer to a relevant expert for advice in respect of an individual's capacity on a specific issue at the specific time, but it is still for the decision maker, having taken into account all relevant advice, to assess the individual's capacity.

### **So in what circumstances, for example, might a scheme manager or care assistant need to consider and assess someone's capacity?**

- When asking somebody to sign their needs and risk assessment and support plan – it is not appropriate to press someone who is incapacitated for consent.
- When there is reason to believe that a relative is taking money from someone with dementia for his/her own benefit – is capacitated informed consent being given?
- When someone with deteriorating sight who has driven a buggy outside for years decides to go out on an unfamiliar busy road despite advice to the contrary
- When signing up a new tenant
- When someone's family says that it's time for that person to move on and give up the tenancy
- When someone refuses care that they desperately need
- When someone's behaviour leads them to act in breach of covenant

Care or housing providers may not have the ultimate responsibility for deciding whether the individual is capacitated in these situations, but have to make an initial assessment in order to determine whether they should refer the situation to a professional for a more in depth capacity assessment or

back to the responsible body (Social Services or NHS). The example of the person who consistently refuses to get put of bed illustrates this. While the statutory body is likely to be responsible for making a decision about major foreseeable issues over which disputes could arise (because of their responsibility to meet needs), the provider can expect to be responsible for deciding capacity regarding the more unpredictable and minor issues arising.

The more complex or serious the decision, or the greater the potential consequences, the more important being sure about incapacity becomes. If in doubt, it is advisable to seek advice from experts involved in the person's care, e.g. a GP, psychiatrist, or multi-disciplinary approach depending on the issue.

If there is an intractable argument about it, ultimately, the court must decide.

## **6 WHO CAN ACT FOR A PERSON WHO LACKS CAPACITY?**

The Mental Capacity Act 2005 sets out a range of new mechanisms individuals can employ to set out who would have authority to make decisions or carry out actions on their behalf, both before and after they lose capacity.

In addition, the Act provides statutory authority for other individuals and the new Court of Protection to make decisions on behalf of an incapacitated person where this is necessary and the person has not made prior arrangements.

The Court of Protection can also consider decisions made on behalf of an incapacitated person and make a declaration as to whether these decisions are lawful.

Those working or supporting anyone who may lack capacity will need to be aware of the powers and duties imposed by the Act on:

- The Court of Protection
- The donee of a Lasting Power of Attorney or Enduring Power of Attorney
- A Court appointed deputy
- Public authorities
- People who have a duty of care including employed staff such as ambulance crew, housing professionals and care providers, and family or other informal carers who have taken on a responsibility to care.

All of the above can make decisions or act on behalf of an incapacitated person within specified limits which differ from one another. Please see section 10 below and Housing LIN information sheet no.1 for more details.

## **7 HOW TO DECIDE ON SOMEONE'S BEST INTERESTS**

The new Act imposes a duty on the decision maker to act according to the individual's best interests. This applies as much to informal day-to-day decisions and actions as to the decisions taken by those with formal authority. The accompanying Code of Practice makes it clear that ultimate responsibility for working out best interests lies with the decision maker and that the

decision maker will need to consider all relevant factors, having taken into account the incapacitated person's own tastes, belief/value system. It is essential that the decision or act be made in the person's best interests by following a particular process, as follows:

- Don't simply assume on the basis of someone's age, appearance, medical condition or behaviour
- Try to identify issues and circumstances of relevance to the decision in question
- Is capacity likely to be regained? If so, can decision-making wait until then?
- Do whatever is possible to involve the person in the decision
- Try to find out the views of the person who lacks capacity:
  - As expressed in the past or currently, or by habits and behaviour
  - Any beliefs and values known to be held that would influence the decision
  - Any other factors the person would be likely to consider if able to do so
- Consult other relevant people
- Weigh up all the factors to decide what is the person's best interests
- Remember a best interests decision does not *have* to be the least restrictive option and can impinge on a person's human rights, provided this is objectively justified and proportionate and within the explicit qualifications or caveats to the rights (such as the protection of others' rights and freedoms, which could be relevant in a housing context).

Before acting on behalf of someone where it is clear they lack capacity it is therefore important to identify the correct decision maker and also to ensure that the individual has not previously determined how such a decision should be made, e.g. through an advance decision.

Where satisfied that you are obliged to take over the incapacitated person's decision-making, you must make your decision on the basis that any decision or action is in their best interests. Again, the Code of Practice recommends that decision makers seek to act in a way that first looks to protect the position of the incapacitated person, where they are likely to regain capacity. Where this is impractical, then one should go on to consider the incapacitated person's wishes, feelings, values and beliefs as held when they were competent or those they would be likely to have now if they were competent.

Finally, one should consider the incapacitated person's current incompetent wishes etc., and involve them in the decision-making, irrespective of their incapacity, so that any decision made or action required is not imposed on them wholly without explanation.

## **8 CONSIDERATIONS FOR PEOPLE WHO HAVE A MORAL OR LEGAL DUTY OF CARE**

Formal and informal carers (including family and friends) who look after and act on behalf of someone who becomes incapable of giving consent, can continue to fulfil that role without fear of liability, provided that the acts carried out are in connection with the care or treatment of an incapacitated adult, they

reasonably believe the person lacks the capacity on that issue and they have taken all reasonable steps to ascertain that the act is in the incapacitated person's best interests.

The term 'acts in connection with the care or treatment' is not defined; the Code explains that this is left deliberately wide. The Code of Practice details a non-exhaustive list of acts that could theoretically be carried out within this protection, both in respect of personal care and health care of an incapacitated person. (See paragraph 6.5 of the Code of Practice.)

These include:

- Physical assistance with washing, dressing and personal hygiene
- Helping with eating or drinking
- Helping with mobility
- Doing shopping or buying essential goods
- Arranging household services, e.g. repairs
- Arranging domiciliary or other services required for the person's care (e.g. cleaning or meals provision)
- Acts in relation to other community care services
- Acts associated with a change of residence, eg. house moving and clearing
- Moving a person from one address to another (subject to the rules on proportionate restraint)

The position is the same as it was prior to the new Act coming into force: carrying out such actions on someone without their informed consent could constitute an assault, trespass to the person or their property, or the civil law wrong of "conversion of goods". However, informal and formal carers have relied on the doctrine of necessity as protection against liability for carrying out such acts, where someone was unable to give informed consent. The new Act provides a clear statutory defence for the carer (see Section 9 below) whilst at the same time providing protection from abuse for the incapacitated individual through the safeguards imposed by s1-4 of the Act, which bind everybody.

In addition to acts in connection with health and personal care, the new Act makes provisions for others to purchase 'necessaries' on behalf of an incapacitated person. For more detailed discussion as to what will be permissible for others to buy with an incapacitated person's money or how they may 'pledge the credit' of an incapacitated person, please see Housing LIN information sheet no. 3.

## **9 SECTION 5: PROTECTION IN CONNECTION WITH CARE OR TREATMENT**

The Act grants protection from liability to people undertaking acts which would normally require an individual's consent if s/he had the capacity to give it. Whilst the decisions or acts need to relate to "care or treatment", as described above, this term is not narrowly defined.

To be protected, any decision or act made or done on behalf of someone who lacked capacity must comply with the following:

- **Doctrine of necessity/human rights** – the act can be justified as being necessary and proportionate
- **Best interests’ principle** – the act is in the person’s best interests and the correct steps have been taken, eg. consulting a range of relevant people, where appropriate and practical, to ascertain this.
- **Restraint rules** – if the act is intended to restrain the person in any way, the act must be “necessary to prevent harm to the person” and must be proportionate to the likelihood of the harm and its seriousness. (There is a subtle distinction between restraint which is allowed in these circumstances and “depriving someone of their liberty”, which is not - for more details see the Housing LIN information sheet no.2).
- **Least restrictive principle** – subject to lawful resource considerations, the step taken ought to be the least interventionist and least restrictive necessary to prevent the harm or reduce the risk, even if it does not necessarily eliminate it altogether.

Family carers and other informal carers are not expected to be experts in assessing capacity, and it is therefore sufficient for them, amongst others using the Act to hold a reasonable belief that the person lacks capacity in order to receive statutory protection from liability.

You would not be protected from liability by s5 of the Act, if you had a duty of care and failed to act to prevent serious harm – this would be seen as negligence. You have a statutory defence if you DO something which normally requires consent in order to make your action lawful, not if you FAIL to do something.

S5 does not appear to provide protection if something is done which requires specific authority to act on someone’s behalf (e.g. LPA or deputyship) and which would otherwise not be effective in the first place, eg. signing a tenancy for an incapacitated person. You must have specific authority to do that and other things like managing a bank account, to make it legally valid at all.

The Act makes clear that no s5 protection can be claimed where acts are:

- are in contravention of a lawful decision made by a deputy or LPA;
- are negligently performed;
- amount to restraint (unless additional safeguards are met);
- amount to a deprivation of the incapacitated person’s liberty; or
- done even though the person carrying out the act, knew, or ought to have known, the individual had capacity on that issue.

The importance of recording the decision making process is clear. Those acting on behalf of incapacitated persons, particularly where they are doing so in a professional context, have an obligation imposed by the Code of Practice to ensure that the appropriate records are made, detailing who was consulted by the decision maker, what information was considered, how the decision was reached and what actions were taken.

## **10 NEW MECHANISMS FOR SUBSTITUTE DECISION MAKING UNDER THE MENTAL CAPACITY ACT 2005**

The MCA establishes new mechanisms for others to take over decision-making functions for those who lack capacity, including - for the first time - personal welfare decisions. The MCA establishes a hierarchy of who must be

consulted and, in some instances, whose opinion/decision should be acted on. This will directly impact on the management of the lives of incapacitated people, including those in independent living projects. It is important to note that those involved in the care of anyone who may lack capacity, and in particular with a statutory duty to provide care or who receive payment for providing care, must ensure that they have a full understanding of the role, obligation and limitations of these new powers as well as how these may restrict their own powers to intervene and provide services.

## **A     **ADVANCE DECISIONS****

Advance decision notifications enable a mentally competent adult to make advance treatment decisions to *refuse* specified medical procedures or treatment in the event of loss of capacity or inability to communicate at some time in the future.

No individual, whether or not s/he has capacity, has the right to *demand* specific forms of medical treatment. However, requests for specific forms of treatment or expressions of wishes or preferences made in advance by a person who subsequently lacks capacity to consent to treatment should be taken into account (in particular those that are expressed in a relevant written statement) in deciding what treatment would be in that person's best interests.

The new Act places an obligation on professionals to comply with a valid and applicable advance decision. Only those 18 and over and with capacity on the issue can make an advance decision. To be valid an advance decision refusing life-sustaining treatment has to be in writing and witnessed. Advance decisions not involving a refusal of life sustaining treatment can be verbal and will be applicable once the circumstances described occur, both in terms of injury/illness and proposed treatment.

A valid and applicable Advance Decision cannot be overridden even by the Court and there is no s.5 protection for anyone who acts in contravention to it, but there are some instances where professionals would be lawfully entitled to ignore it.

The decision of a registered LPA will override an advance decision if the LPA document was made after the decision and gave the attorney the right to consent to or refuse the treatment specified.

There are special rules for people who are detained under the Mental Health Act 1983 – in some circumstances, their advance refusal of treatment for a mental disorder may be overridden.

Advance decisions will also be inapplicable if the individual subsequently does something which is clearly inconsistent with the advance decision.

There are several situations where a medical professional or an administrator of medicine would be safely within the law to ignore an Advance Decision, eg. if someone's Advance Decision is not known about, they would probably be treated anyway, in an emergency. Also, if the health care provider has reason to doubt the validity or coverage

of the Decision, then there is an excuse in the statute for treating the person anyway, to prevent deterioration to a person's condition, pending resolution of the doubts by a court. Thirdly, medical professionals are encouraged by the Code to allow for the fact that advances in medical knowledge may have revealed a cure or a treatment for something, that was not known of at the time the Decision was written, in which case it would not be right to assume that the patient would still make the same decision to refuse treatment, in the light of the updated information. Finally, the Code mentions the possibility that a person might convey through a lifestyle choice that their values had changed, and how it might then be *right* to treat the person, despite the previous Decision, on the footing that he or she had simply omitted to tear it up.

## **B LASTING POWER OF ATTORNEY**

A person with capacity can appoint someone eg. a relative, friend or solicitor, to act on their behalf if they should lose capacity in the future.

- The LPA can cover:
  - Property and Financial Affairs – this can grant the donee power to control and manage the incapacitated person's bank accounts, property, including any sale or acquisition of property, make a contract on the person's behalf and make any gift to a third party of the incapacitated person's money or property. The LPA could cover signing or surrendering a tenancy on the person's behalf, as a tenancy is property.
  - Health and Personal Welfare Decisions – includes things like deciding *where* someone should live, or consenting to or refusing treatment or agreeing a Local Authority care plan.

The donee of an LPA cannot use their power unless this has been registered with the Office of the Public Guardian and thereafter can only act in those areas specified by the donor within the LPA. They must also comply with the principles and duties set out in the new Act.

With a Property and Affairs LPA, the donee acquires the power to act before the donor loses capacity unless the donor directs otherwise.

Where the LPA gives substitute powers to make personal welfare decisions, the donee

- can only act once the donor has lost the capacity to decide/act for themselves on that specific matter
- can only give or refuse consent to health care treatment if specific authority has been given
- a valid and applicable advance decision on the matter made later will override the donee's authority to act.

For full details of the powers of donees, please see Housing LIN information sheet no.1.

## **C THE COURT OF PROTECTION**

The new Court of Protection will consider all serious issues capable of legal consideration which arise from any aspects of the new Act. The Code of Practice focuses on minimising disputes, or where this is not possible, resolving these informally in a quick and cost-effective manner. Alternative solutions to disputes should be considered before any application to the Court is made as the Court will only consider a matter if appropriate alternatives have at least been considered and not pursued for good reason.

Where there is a dispute, or a decision needs to be made relating to someone who lacks, or may lack, capacity to act or decide on a particular matter – this could be property, financial affairs, health or well-being - the Court can:

- Make declarations regarding a person's capacity to make a specific decision, or a decision on a range of issues (for example, the decision to refuse care)
- Make declarations on the lawfulness of acts (including a course of conduct or an omission) done, or to be done, to a person without capacity, for example, the decision to move someone to alternative long-term accommodation in a situation where interested parties cannot agree.
- It can also consider the legality of advance decisions concerning medical treatment; that is, it can declare:
  - Whether a person lacks capacity to consent to or refuse treatment at the time the treatment is proposed;
  - Whether an advance decision is valid and is applicable to the proposed treatment in the specified circumstances which have now arisen.
- Make decisions on behalf of the incapacitated adult. The new Act lists the types of decision that only the Court can make, namely deciding where the person should live if this results in a deprivation of liberty, what contact they should have with specified persons or prohibiting contact with named individuals. The Court may also refuse the continuation of medical treatment where this may lead to the person's death and can order the transfer of the named person from those responsible for the incapacitated person's health care.
- Appoint a deputy to act as decision maker on behalf of the incapacitated adult. Their appointment should be as limited in scope and duration as possible. Where possible a single order should be made about a specific issue, in preference to appointing a deputy.
- Police the conduct of Lasting Powers of Attorneys, for example, it may clarify the terms of an LPA, determine the validity of an LPA and give directions as to how the LPA should be operated. It may also refuse to register a LPA or revoke an LPA if it believes this to be in the best interest of the incapacitated adult.

The Court is assisted by Court of Protection Visitors, including Special Visitors who will be medically qualified, and the Office of Public Guardian, but it may also order an NHS body or Local Authority to provide a report or disclose information to assist it in forming a decision. Providers of accommodation required to be registered under part II of the Care

Standards Act 2000 may also be required by the Court to disclose information held in relation to an incapacitated person.

#### **D COURT APPOINTED DEPUTY**

A person/s or the named holder of a specified office can, provided they are over 18, be appointed by the court (jointly or severally) to make decisions on behalf of an incapacitated person. The Act supposes that powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances and that the use of deputyship for substitute personal welfare decision making will be rare.

The Housing LIN information sheet no.1 sets out in detail the role, procedure for appointment and limitations imposed by the Act on deputies. In brief, deputies are obliged to comply with the MCA (s.1-4) and have regard to the Code of Practice; they can be compelled to report to the OPG and, if necessary, the Court can revoke their powers where it determines this to be in the best interest of the incapacitated person.

Deputies who are given power to make personal welfare decisions on behalf of an incapacitated adult's will be entitled to make decisions as to where the person should live. However, where such a decision may result in the restraint of the incapacitated person the deputy must satisfy himself (and possibly the OPG or Court) that the restraint is necessary and proportionate. A deputy can never authorise the deprivation of liberty of an incapacitated person. A personal welfare deputy is explicitly prevented by the Act from refusing life sustaining treatment on behalf of the incapacitated person or from changing the person's health care team responsible for the incapacitated person. In addition, a deputy cannot prevent a named person from having contact with the incapacitated person.

Deputies given powers of substitute decision making on behalf of an incapacitated person in respect of financial and property affairs are expressly forbidden by the Act from creating any settlement of the incapacitated person's property, making a will on his behalf or exercising any power of consent specifically vested in the incapacitated person which would require his (and his alone) capacitated decision making, e.g. signing a will.

A deputy cannot override a lawful decision made by a donee of a LPA.

#### **E THE OFFICE OF PUBLIC GUARDIAN**

The MCA creates a new public office - the Office of the Public Guardian - that has a range of functions that contribute to the protection of people who lack capacity, including:

- Keeping a register of Lasting Power of Attorneys
- Keeping a register of orders appointing deputies

- Supervising deputies appointed by the Court
- Directing Court of Protection Visitors
- Receiving reports from attorneys
- Providing reports to the Court
- Dealing with enquiries and complaints about the way deputies or attorneys use their powers

The OPG will have a far more proactive involvement in combating financial abuse arising in relationships with LPAs and Deputies. The OPG will also be responsible to direct Court of Protection Visitors to 'visit' people who lack capacity, and their LPAs and Deputies. The Court of Protection Visitors will have an important part to play in the investigation of possible abuse cases and will act as independent advisers to the Court in this capacity. They will also however, have a more positive role to play in providing help and general advice to LPAs and Deputies in how properly to fulfil their role.

## **F INDEPENDENT MENTAL CAPACITY ADVOCATES (IMCAS)**

From April 2007, the NHS/Local Authority (Responsible Body) where an incapacitated person is residing *must* appoint a suitably experienced IMCA where an 'unbefriended' incapacitated individual may require serious medical treatment or a long-term move into long-term care settings. ('Unbefriended' means having no family or friends to speak for them)

Only housing that is provided by the public sector as a placement under the National Assistance Act (in the sense of being directly contracted for by the local authority or the National Health Services with the provider) triggers an IMCA, and tenancies are almost never in that category. If a local authority grants a tenancy to a person, it normally does so under housing legislation. For further explanation of this point, see the last section of Information sheet 4, Statutory Duties to Accommodate.

The NHS/ local authority *may* appoint an IMCA for a review of a placement or when there is an allegation of abuse and the NHS/LA intend to take protective measures. An IMCA must be independent of the public authority proposing the move or treatment.

IMCAs have the power to

- Interview the person s/he is representing in private
- Examine and take copies of any health record, any social services related record, or any registered provider's record considered relevant to the investigation of the IMCA

IMCAs will

- Provide support so the incapacitated person participates as fully as possible
- Obtain and evaluate relevant information
- Ascertain the likely wishes, feelings and values of the person
- Ascertain any alternative courses of action
- Obtain further medical opinion if IMCA thinks it desirable

- Challenge or provide assistance in challenging any relevant decision

The relevant public authority must take into account the views of the IMCA, but their role is advisory - they are to represent the person's interests and ensure that the proper procedures and principles have been considered in decision-making; they cannot act as a substitute decision maker.

IMCAs will also be able to challenge decisions made by public authorities on behalf of an incapacitated adult, but in practice, any challenge will be likely to be through the complaints procedure rather than the Court of Protection or Administrative Court.

## 11 THE ROLE OF PUBLIC AUTHORITIES

Local Authorities (Adult Social Services) and the NHS have various duties and powers under a range of legislation in relation to assessment, care provision, treatment and adult protection. They also have residual powers under Section 21 of the National Assistance Act 1948 to provide accommodation to anyone over 18 in need of care and attention as a result of age, illness, disability or any other circumstance. For a full explanation of these, please refer to the Housing LIN information sheet no. 4.

They are also subject to the positive obligations to safeguard individuals' rights imposed by the provisions of the Human Rights Act. They sometimes have to intervene to protect or treat an adult who lacks capacity to consent, but this does not give them complete freedom to do literally *anything* (See Section 5 protection).

In the case of uncertainty or dispute, they can apply to the Court of Protection for a declaration. However, the court has no jurisdiction to consent to welfare matters which are not compellingly necessary in the first place, eg. marriage, sexual relations, or having direct payments instead of services. It is advisable for the responsible authority to go to the Court of Protection for its approval where an act is potentially in breach of the Human Rights Act, eg. moving an incapacitated person, or preventing them from going home, in both cases against the person's apparent wishes, or someone else's.

## 12 CAPACITY AND DECISION MAKING IN THE CONTEXT OF HOUSING PROVISION

What will the position be once the Act comes in regarding a decision to move to an Extra Care Housing or other supported housing setting, if the person's capacity to agree or to decide is in doubt?

### A) Deciding where to live

- This is a personal welfare decision.
- The individual concerned must be able to exercise an informed choice which would require being able to manage the four steps in the test for incapacity.
- If the person cannot manage one of the steps, a welfare decision can be made informally that the person needs to move, and they can be

moved physically under s5, but that does not equate to power to make effective legal arrangements for tenure or occupation of premises.

- A donee under an LPA who has been given a welfare authority can make the decision where the donor should live and can override others in this regard. But in order to make any arrangements for tenure or property acquisition a donee under an LPA would need to have been given authority over the incapacitated person's property and financial affairs.
- The Court of Protection can make this welfare decision under a best interests application.
- A court-appointed deputy could make the decision if such decisions were within the powers specifically given by the Court.
- Where the person lacks capacity to decide where to live and there is no other person with the necessary authority to decide on their behalf or make arrangements, a Public Authority may be obliged to act as decision maker, where they owe the incapacitated person a statutory duty of accommodation, for instance under the National Health or social services legislative framework. For more detailed information as to which public authorities may be compelled to act and in what circumstances please see the Housing LIN information sheet no. 4.

#### **B) Applying to public authorities for housing**

- Various legislation imposes obligations on health, housing and social service authorities to provide accommodation where an individual's assessed needs meet the eligibility criteria. In some instances, for example applications under the Housing Act 1985, an individual may be required to have capacity to make an application to the public authority. In most cases, however, a duty will arise regardless of the individual's capacity to understand the nature of their application for assistance or to contract for the provision of services. Where such a duty to accommodate does arise the individual may be provided for by way of the statutory duty and the public authority is likely to have a duty to ensure any provision of accommodation is appropriate to meet the individual's assessed needs. For full details on the duties of public authorities regarding accommodation, please see the Housing LIN information sheet no. 4.
- In order to change a care plan from one which provides a contracted placement in accommodation *for* the individual, contracted for by the local authority, to one where the individual takes on the contract, the authority has to be satisfied that the person no longer needs that form of help, and has the mental capacity to understand the essence of a purchase or rental agreement, and wants to take on that responsibility – or someone who is able and willing to do it for them.
- Where the person is not capable of these things, a local authority can legitimately see if there is a willing, able and authorised person to make that decision in place of the person concerned, if such an individual exists. 'Authorised' here means properly *authorised* to stand in the shoes of the person him or herself, as an agent with authority to sign a tenancy, for example an existing Enduring Power of Attorney or Property and Affairs Lasting Power of Attorney.

## C) Tenancies (Periodic tenancies and long leases)

### i The person with capacity

- A person can be said to have capacity regarding the decision whether to accept a tenancy if they are able to understand the basics to sign the tenancy. Evidence that the individual understood the essentials of the deal, i.e. the basic concept of money, owning it, exchanging it in return for something, and the basic concept of promises and rules which need to be abided by (even though they may require help to manage to keep to what they have promised), is likely to satisfy a court that the individual had the required capacity at the time the tenancy commenced, to be held to the contract terms. Given the nature of social housing provision, where there is any doubt as to the person's capacity, a landlord is advised to note down any observations or evidence of the individual's capacity to undertake the tenancy prior to the agreement being entered into, and consider seeking professional advice.
- The new Act imposes a positive obligation on anyone involved in the care and treatment of those lacking capacity, including managers of supported housing projects, to maximise a person's capacity. A person should therefore be assisted by whatever means are practically available to understand the nature of the tenancy. In particular, it is important that any restrictions on behaviour are carefully explained. Where patient explanation and sufficient support means that the individual understands the nature of the agreement, they will have full capacity to undertake the tenancy.
- Where someone with capacity refuses to take on a tenancy, for instance because they do not want to make themselves liable for rent and obligations, this refusal will be valid. A financial or property LPA might have authority to take on a tenancy regardless of the person's wishes, but this is unlikely. Apart from this, no one else can take over decision making, even if that person firmly believes it is in the person's best interests – for a capacitated person.
- A tenancy signed while someone has capacity remains valid once they lose capacity.
- As capacity is an issue-specific matter it is foreseeable that an individual may have capacity to agree to a move and sign a tenancy, but recognise that handling a tenancy is difficult. A person who has a tenancy might be able to authorise someone to manage it as their agent (assuming they have the required capacity for this decision). This could be through an ordinary informal or agency arrangement, an ordinary power of attorney or by granting authority under a property and finance LPA. An ordinary power of attorney ceases to confer any authority however on the agent once the grantor of the power loses capacity in relation to the thing concerned. Of these arrangements, only an agent who has a property and finance LPA or EPA has the legal authority to sign a new tenancy agreement if the person loses capacity to sign it themselves. (Please see Housing LIN information sheet no. 1.

### ii An Authorised Agent

- A person without capacity to understand the essence of a tenancy cannot be put into one by someone else unless they have special authority. It cannot be done under the doctrine of necessity or best interests because those principles afford defences, but do not convey free standing *power*.
- A person with capacity to understand that the notion of a tenancy is difficult to understand can authorise someone else to sign it for them as their agent. A person who lacks capacity even to understand that they need help in making the decision whether or not to enter into the tenancy, cannot appoint an agent to do it for them.
- An LPA donee with financial or property authority can sign or surrender a tenancy on the individual's behalf.
- An authorised signatory (LPA, deputy or existing Enduring Power of Attorney holder) signs as the agent of the incapacitated person. S/he does not take on liability, without expressly agreeing to do so, for the defaults of the incapacitated person for whom s/he acts, so should be asked to guarantee the rent or indemnify the landlord against damages or other breaches if the landlord has concerns.
- A receiver, or its replacement - the court-appointed deputy - can also sign or surrender a tenancy.
- A Single Order can be obtained from the Court of Protection covering the single issue of decision making in relation to housing tenure. The tenancy will be the occupant's own tenancy, for legal purposes, even though it is not understood.
- Local authorities do not have the power to sign or surrender tenancies on behalf of incapacitated adults without specific authorisation
- Anyone can ask a landlord informally to release someone from their obligations. The landlord will often be willing to release the tenant so that s/he can re-let the premises to a new tenant. The position of the landlord is not clear, because s/he or he will know that the tenant has not actually asked for the release, and that the person asking does not have authority to manage the person's legal relationships in this regard, so this is not good practice.

### iii Tenancies signed by a person without capacity

- If a person without capacity to understand the essence of a tenancy actually signs one personally, it is presumptively valid, but may be undone later, by someone taking the view that the landlord must have known of the person's incapacity. However, it is poor practice and abusive to make someone who lacks capacity sign a tenancy agreement.
- A tenancy signed by an incapacitated person remains valid unless/until "avoided". This can be done by the incapacitated person if he/she regains capacity, or by a litigation friend, an attorney/LPA finance and property donee or by a receiver/court-appointed deputy. Undoing it, though, means the person then has no tenancy.

### iv Tenancies created in other ways

- Capacitated individuals such as a son or daughter without any form of legal authority to sign a tenancy on behalf of an incapacitated person would in effect be making themselves the tenant, with the resident becoming the sub-tenant or licensee of whoever did sign. The

incapacitated person would not be in a direct contractual relationship with the landlord. However, if the landlord is happy with this arrangement and Housing Benefit is not needed to pay the resident's costs this would not be inappropriate. In this situation, the signer of the tenancy is personally liable for rent and contract compliance and the landlord would have to take action against the signatory for breach of the terms of the tenancy by the ultimate occupier, over which s/he may have no control.

- Under the Contracts (Rights of Third Parties) Act 1999, a capacitated person could sign a tenancy conferring a right of occupancy on another (incapacitated) person. This would mean the capacitated person was directly liable for rent and any damages or breach by the incapacitated person, but that the occupant had the same rights against the landlord as the person actually signing the agreement. Under the 1999 Act, the parties to the contract are able to exclude this right of enforcement but if they do not say so, then the fact that the contract confers a benefit (occupation rights) on the occupant is sufficient to enable the occupant to enforce the terms between the actual parties. The landlord can only take action against the occupant, for instance for breach of covenant, if the occupant - or signatory on the occupant's behalf - has initiated legal proceedings to enforce contract terms against the landlord. Provided such arrangements were agreeable to the parties this would give the incapacitated person direct rights of occupation, and rights under any covenants for quiet enjoyment, enforceable via the help of a litigation friend.
- At common law, anyone occupying premises owes compensation to the landowner for use and occupation, and anyone causing negligent damage to property is liable in the law of tort. Tenancies could be arranged without signature so long as the landlord was happy to take on tenants who could not understand the conditions in the tenancy and would not be able to be held responsible for complying with "good behaviour" covenants or made *contractually* liable for breakages or other damage.

v Landlord's risks, rights and responsibilities

- Capacitated tenants could agree to terms which imposed a measure of restraint upon them and their lifestyles but they would need to understand that this is what they were being asked to do. By contrast, no one can impose restrictive measures on an incapacitated person where such restrictions may amount to restraint (unless further conditions are satisfied) or a deprivation of liberty. Authority from the Court will be needed even if it is believed to be in a person's best interests. Please see Housing LIN information sheet no. 2 for further details
- Where the tenancy is entered into and the landlord had express or implied knowledge of the tenant's incapacity a landlord may not be able lawfully to evict for breach of the contract if a tenant cannot help himself or herself causing nuisance or annoyance – that could count as disability discrimination, under the DDA, unless actual physical harm were being threatened.
- Any legal action against an incapacitated occupier of premises for possession, rent arrears or damages for breach of covenant, will require the appointment of someone as a litigation friend, because the

court rules require it if the person is incapable of managing their own property and affairs.

- A landlord cannot be made to contract with people who lack capacity. The Disability Discrimination Act offers providers of goods and services, including housing providers in the context of letting premises, a justification for refusing to provide where the recipient lacks the capacity to contract and therefore be held to account for payment and other aspects of contract compliance.
- In an Extra Care Housing setting, if the tenancy is potentially invalid or not directly between the resident and the landlord, registration consequences may follow: If the occupant doesn't have his or her own tenancy and security of tenure, there is the risk that the premises will not be treated as the person's "own home", and that the package being provided will be more likely to be seen as providing "care together with accommodation" and hence triggering registration as care home provision under the Care Standards Act.

vi Payment of Rent

- S8 of the new Act may give an informal carer the authority to pledge the incapacitated person's credit to pay for rent, or to promise to pay for breakages or other damage, but it does not make the carer personally liable. Getting the money or possession of the property back will still be subject to the rules on suing an incapacitated person in the courts.
- S7 powers to pay for necessary goods and services would enable an informal carer to use any money of the incapacitated person which is in their possession to pay care and support charges - but not necessarily rent, because occupation rights are neither goods nor services, in legal terms.
- Neither a credit pledger nor an authorised signatory takes on personal liability, without expressly so agreeing, for the defaults of the incapacitated person for whom s/he acts, so should be asked to guarantee the rent or indemnify the landlord against damages or other breaches, if the landlord has concerns.
- For more details, please see the Housing LIN information sheet no. 3.

## 13 PREVENTING ABUSE

Practitioners and those involved in adult protection have raised concerns that the new Act has not put in place sufficient mechanisms to protect vulnerable adults from abuse, particularly financial abuse. It may appear that the Act could in fact provide increased opportunities for those involved in the care of an incapacitated person to misappropriate the individual's funds due to the statutory powers to spend the incapacitated person's money on necessities embodied in s7 of the Act as well as the legal protection offered under s5 of the MCA.

However, it is worth highlighting that all powers given under the Act are limited to those actions necessary to safeguard or promote an incapacitated person's best interests. Where someone is not able to show that they believed that they were acting in the person's best interests they do not qualify for the protection provided by s5 and may in fact be guilty of either one

of the two new criminal offences created by the Mental Capacity Act, namely ill-treatment or wilful neglect of an incapacitated person.

In addition to the new offence, the Act creates a number of new statutory bodies intended to monitor the actions of anyone appointed as a substitute decision maker under the new Act. Similarly, anyone acting informally must now comply with the principles imposed by s1 of the Mental Capacity Act and with regard to the Code of Practice in order to benefit from s5 immunity.

Where there is suspicion that any substitute decision maker - an LPA, deputy responsible body or informal carer - may be acting outside of their duties or in contravention of the principles set out in s1, then the matter can be referred to the Office of the Public Guardian or the Court of Protection, both of whom have powers to investigate allegations (through the appointment of Visitors). If necessary, the Court of Protection is able to revoke an LPA or deputy's authority to act. Ultimately, any suspected criminal activity should be referred to the police.

The mechanisms in place to monitor arrangements and provide protection for vulnerable adults against financial or physical abuse are unlikely to have sufficient capacity to provide close scrutiny to each and every arrangement for substitute decision making. Protection of this vulnerable group will very much depend on the close scrutiny of arrangements by those involved in the care of individuals. For that reason it is imperative that anyone with a duty of care towards an incapacitated adult fully familiarises themselves with the powers, but also the limitation of those powers, as set out by the Act so that they are confident they are acting within the authority given to them by the Act, and are able to challenge any other would-be substitute decision maker if they have concerns that they may not be acting lawfully or in the individual's best interests.

Where care and housing providers find themselves in direct confrontation over the incapacitated person's best interest with others purporting to act with authority given under the new Act, either because they are donees of a LPA or court appointed deputies, providers must be aware that they are only able to act contrary to the direct instructions of a donee or deputy where it is necessary to prevent a serious deterioration in the person's condition or if it involves giving life sustaining treatment. However, any actions are only permissible whilst direction is sought from the Courts and so it would be necessary to refer the matter immediately to the Court of Protection wherever confrontation or concerns arise.

## **14 CONCLUSION FOR HOUSING PROVIDERS**

There is still an important role for housing providers in:

- monitoring the well-being of service users
- advocating on their behalf in cases of suspected abuse

Housing providers need to be aware of capacity issues. They need to be confident that they are able to correctly identify the issue of capacity that needs to be tested, they can correctly apply the test of capacity and decision-making and are fully aware of the steps available to them if someone's capacity is in doubt. In addition, they must have sufficient knowledge of the Act and the new mechanisms available to ensure that any substitute decision

making undertaken on behalf of an incapacitated person is undertaken by the right individual or body and that that person or body fully considered their obligations towards the incapacitated person prior to carrying out any act on behalf of the incapacitated person.

When undertaking needs and risk assessments they need to keep in mind all available options provided by the new Act to those with capacity to plan for when they may lose this so as to assist them in planning for the future, including assisting them to consider whether they would wish to make an advance decision notification or appoint someone they trust to take over decision making on their behalf through a property and financial affairs and/or personal welfare Lasting Power of Attorney.

Housing support providers have clear duties towards anybody living within their projects. Under the new Act, this will include a duty to maximise their capacity and, where necessary, ensure any substitute decision making is made in the tenant's best interest. For their own protection and that of the organisations for whom they act, landlords should ensure that any arrangements for accommodation and care are lawful, for example ensuring that the tenant had sufficient capacity to understand the nature of the agreement or else that there is an authorised contractual party. This will protect themselves, their employees and their clients.

## **FURTHER READING**

### **Housing LIN Information Sheets as follows:**

- No.1 – The Mental Capacity Act 2005: Substitute Decision-Making and Agency**  
– describes in more details powers and limitations of different legal instruments for making decisions on behalf of others
- No.2 – The Mental Capacity Act 2005: Lawful restraint or unlawful deprivation of liberty?** – expands on how to distinguish between the two
- No.3 – The Mental Capacity Act: Paying for Necessaries and Pledging Credit** – goes into more details about payment powers under the Act
- No.4 – The Mental Capacity Act 2005: Statutory Duties to Accommodate** – describes the legislative framework for housing people in the context of the Act

### **Code of Practice**

<http://www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf>

### **Formal documents including the Act itself**

<http://www.dca.gov.uk/menincap/legis.htm>

### **Official Training Guides for a range of target groups**

[http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_074491](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_074491)

**MCA toolkit for organisations** – helps organisations to assess their preparedness for the Act

[http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_4137745](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4137745)

## Other Housing LIN publications available in this format:

- Factsheet no.1:      **Extra Care Housing - What is it?**
- Factsheet no.2:      **Commissioning and Funding Extra Care Housing**
- Factsheet no.3:      **New Provisions for Older People with Learning Disabilities**
- Factsheet no.4:      **Models of Extra Care Housing and Retirement Communities**
- Factsheet no.5:      **Assistive Technology in Extra Care Housing**
- Factsheet no.6:      **Design Principles for Extra Care**
- Factsheet no.7:      **Private Sector Provision of Extra Care Housing**
- Factsheet no.8:      **User Involvement in Extra Care Housing**
- Factsheet no.9:      **Workforce Issues in Extra Care Housing**
- Factsheet no.10:     **Refurbishing or remodelling sheltered housing: a checklist for developing Extra Care**
- Factsheet no.11:    **An Introduction to Extra Care Housing and Intermediate Care**
- Factsheet no.12:    **An Introduction to Extra Care Housing in Rural Areas**
- Factsheet no.13:    **Eco Housing: Taking Extra Care with environmentally friendly design**
- Factsheet no 14:    **Supporting People with Dementia in Extra Care Housing: an introduction to the the issues**
- Factsheet no 15:    **Extra Care Housing Options for Older People with Functional Mental Health Problems**
- Factsheet no 16:    **Extra Care Housing Models and Older Homeless people**
- Factsheet no 17:    **The Potential for Independent Care Home Providers to Develop Extra Care Housing**
- Factsheet no 18:    **Delivering End of Life Care in Housing with Care Settings**
- Factsheet no 19:    **Charging for Care and Support in Extra Care Housing**
- 
- Case Study Report:    **Achieving Success in the Development of Extra Care Schemes for Older People**
- 
- Technical Brief no.1    **Care in Extra Care Housing**
- Technical Brief no.2    **Funding Extra Care Housing**
- Technical Brief no.3    **Mixed Tenure in Extra Care Housing**

## Housing LIN INFORMATION SHEET: MCA - no. 1

### The Mental Capacity Act 2005: Substitute Decision-making and Agency

*This information sheet is one of four that accompanies the Housing LIN factsheet Housing Provision and the Mental Capacity Act 2005*

It has long been the law that one person, the “principal”, can authorise another, the “agent”, to make decisions on her/his behalf both whilst he or she has capacity and from the point at which it is lost, if special procedures are followed. Usually, the arrangement is by agreement and there is a formal document setting out what decisions the agent is entitled to make on behalf of the principal. In addition, some agency arrangements are imposed either by specific statutes or under the common law doctrine of agency of necessity, even where this may be against the stated will of the principal. Such an arrangement will only be upheld by the law if the principal lacks capacity and it is absolutely necessary for someone else to take on the role of substitute decision maker.

Where someone is lawfully appointed as an agent and is acting within the authority given to them, they are entitled not only to make a decision on behalf of the principal which is binding on the principal, but should be treated by others as if they were the principal. For instance, they may have a right of access to information held by a third party relating to the principal if the information is relevant to the nature of the authority given by the principle. They may also have the ability to make a complaint on behalf of a principal or initiate legal proceedings against a third party, depending on the authority actually given, and its source. It is important therefore that those who are responsible for caring for or providing services to a principal ensure that the agent is acting within their powers and according to the duties they owe to their principal so that any arrangements agreed by the third party are effective.

This fact sheet will look at the mechanisms currently available, and those that will become available, under the Mental Capacity Act 2005, for agency and substitute decision-making. It will also detail the legal requirements necessary for such arrangements and the limitations and duties imposed on agents.

#### **Powers of Attorney**

A power of attorney, provided it is properly executed, allows an agent or “donee” to stand in the shoes of the principal or “donor” for whatever matters the document conferring the power of attorney permits, so long as the matters are within the legal

scope of a power of attorney. An enduring power of attorney is limited to substitute decision making in respect of property and financial affairs. However, under the new Act there is scope for a donor to grant substitute decision making powers to another in respect of their health and some of their personal welfare decisions. Full details are given below.

It is worth noting that where a power of attorney is properly used the donee is authorised to make a decision or agree to a course of action as if he were the donor and the donor is bound by the donee's words or actions. If the donee does not honour the agreement on behalf of the donor then it is the donor who is liable. A donee could only be personally liable for any of his/her actions if s/he does not disclose to a third party that s/he is acting on behalf of the donor in the first place, or if the donee had entered into a free-standing personal guarantee of the donor's obligations or an indemnity against damage done by the donor.

The donee of a properly executed **general ordinary Power of Attorney** will have the authority to enter into contracts, purchase or sell goods or land and buy services on behalf of the donor, but only whilst the donor has full capacity (ie. acting like a manager for the principal). The power ends on the loss of capacity of the donor. The donee can *only* act as agent in respect of matters relating to the donor's property or financial affairs.

The donee of an **Enduring Power of Attorney** is also able to make decisions and contract on behalf of a fully capacitated person in much the same way as those acting under a general power do. Again this power only relates to actions and decision-making in respect of the donor's property and financial affairs. However, unlike a general power, as soon as the donee has reason to believe that the donor has lost capacity, the donee must make an application to the Court of Protection to register the document which created the power and must give notice of the proposed registration to anyone with an interest, including the donor. The registration process gives those with an interest an opportunity to challenge the donee's assessment of the donor's capacity or the validity of the document. If matters which require action occur between the donor losing capacity and the registration of the instrument, then the donee can not do anything under the authority except maintain the donor and protect his property and himself unless a transaction is specifically authorised by the court. If the Court suspects that the donor has become incapacitated and is of the opinion that it is necessary, before the instrument is registered, to exercise any power which the Court could exercise on its registration, then the Court can exercise that power regardless of whether the attorney has applied to register the power.

The effect of the registration of an instrument creating an Enduring Power of Attorney is that the donor cannot amend the power in any way, nor can he revoke the power unless and until the court confirms the revocation. In addition the donee cannot disclaim the power unless he gives notice of the disclaimer to the court.

From October 2007 no new documents conferring an Enduring Power of Attorney can be created. However, s66 of the Mental Capacity Act 2005 makes it clear that any document which lawfully created such a power prior to October 2007 will still be effective. From this date Schedule 4 of the Mental Capacity Act 2005 will govern how Enduring Power of Attorney donees must operate.

Under the Mental Capacity Act 2005, from October 2007, someone with capacity who is 18 or over will be able to create a document authorising one or more agent(s) to make decisions and carry out any necessary actions in respect of their property and financial matters and, for the first time, their health and some welfare decisions. This new power, known as a **Lasting Power of Attorney**, will allow a donee to make decisions on behalf of the donor provided that the document creating the power is valid and registered.

In order for the document conferring a Lasting Power of Attorney to be valid it must be executed on the prescribed form, and be accompanied by an LPA certificate signed by an independent third party who is required to verify not only that he or she believes that the donor had capacity to grant the power, but also was not coerced, put under undue pressure or deceived into creating the power.

Regulation 8 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations lays down who may sign an LPA certificate, subject to being excluded by reg 8 para 3.

It can be

(a) a person chosen by the donor as being someone who has known him personally for the period of at least two years which ends immediately before the date on which that person signs the LPA certificate;

or

(b) a person chosen by the donor who, on account of his professional skills and expertise, reasonably considers that he is competent to make the judgments necessary to certify the matters set out in paragraph (2)(1)(e) of Schedule 1 to the Act.

Examples are given of suitable professionals:

(a) a registered health care professional;

(b) a barrister, solicitor or advocate called or admitted in any part of the United Kingdom;

(c) a registered social worker

(d) an independent mental capacity advocate.

The disqualifications cover anyone who is -

(a) a family member of the donor;

(b) the intended donee of the power;

(c) the donee of

(i) any other lasting power of attorney, or

(ii) an enduring power of attorney,

which has been executed by the donor (whether or not it has been revoked);

(d) a family member of a donee within sub-paragraph (b);

(e) a director or employee of a trust corporation acting as a donee within sub-paragraph (b);

(f) a business partner or employee of—

(i) the donor, or

(ii) a donee within sub-paragraph (b);

(g) an owner, director, manager or employee of any care home in which the donor is living when the instrument is executed; or

(h) a family member of a person within sub-paragraph (g).

Finally the document must be registered with the Office of the Public Guardian. Once the document is registered a donee can make decisions and act in relation to these decisions as the agent of the donor in relation to any of the principal's property or financial affairs even where the donor has capacity to act/make decisions on these matters themselves (unless the donor has specifically put off that power until loss of capacity.) They are purely acting as an agent for their principal in the same way as they would under a General or unregistered Enduring Power of Attorney.

Registration of a Lasting Power of Attorney will not automatically prevent a donor revoking or amending the power (as the registration of a current Enduring power does) provided they still have capacity to do so. S13(2) MCA allows the donor to revoke the power at any time he has capacity to do so. Regulation 21 of the new Regulations requires that a donor who revokes a lasting power of attorney must notify the Public Guardian that he has done so and notify the donee of the revocation. No forms are prescribed for revocation, however, so oral notification must be good enough, it is thought. The Public Guardian has to be **satisfied** that the donor has taken such steps as are necessary in law to revoke the LPA. No guidance is given in the Code as to the status of the LPA pending cancellation of the instrument by the Public Guardian..

However it is important to note that a donee of an LPA cannot act or make any decisions on behalf of the donor where these relate to the donor's health or welfare, unless the donee reasonably believes that the donor lacks capacity on that specific issue at the time that the decision is to be made. If the donor does not want the donee making decisions regarding their health care but has created a personal welfare LPA, then again the document must clearly state this prohibition, because otherwise a general welfare LPA takes effect so as to extend to day-to-day medical treatment.

The requirement for the document to be registered before the donee can substitute his or her decisions for the donor's introduces a formal stage into the creation of the power, rather than at the point where the donor loses capacity. It can be difficult for those acting on the basis of the decision of an LPA donee to verify that he or she is lawfully able to make the decision on behalf of the principal (the donor of the Lasting Power of Attorney). The Mental Capacity Act 2005 and the related Code of Practice do not specifically address this difficulty; however it is clear that the donee of an LPA is obliged to have regard to the Act and the Code, both of which establish clear duties and limitations on the donee, designed to safeguard the donor from abuse. In particular the Act and Code require that a donee comply with the principles as set out in s1 of the Act. Therefore, where the donee only has authority to act when the donor has lost capacity, eg. if it is a personal welfare decision, they will need to satisfy themselves (and possibly provide evidence where there is a dispute) that they have done everything practicable to maximise the donor's ability to make the decision for themselves, that they reasonably believe the donor lacks capacity at that time on the issue in question, and that it is not practicable or in the donor's best interests to wait until the donor has regained capacity and that the donee believes that the decision made is in the best interests of the incapacitated person.

In addition to these safeguards the Act and Code place a number of specific duties on donees of both the Financial and Property and Personal Welfare Lasting Powers of Attorney. A donee must not benefit from their appointment or any decisions they make on behalf of the donor (fiduciary duty); they owe the donor a duty to care to

perform the task and make decisions with due skill; they also owe the donor a duty of good faith and confidentiality and are not allowed to delegate their duties or give up their role without notifying the donor or the Court of Protection. Donees are also obliged to comply with Court of Protection orders, including where necessary reporting to the Court or Office of the Public Guardian and, if they have financial and property decision-making powers, to provide accounts and keep the donor's money separate from their own.

Finally, the Act imposes additional safeguards to limit the opportunity for financial abuse by a donee: for example if the donee is declared bankrupt this automatically revokes their powers to make any decisions relating to the donor's property and affairs; and where the donee is subject to an interim bankruptcy order then the powers are suspended. Note however that bankruptcy of a donee will not revoke the powers to make personal welfare decisions where there is a Personal Welfare Lasting Power of Attorney. Neither does the dissolution of a marriage or civil partnership between the donor and the donee automatically revoke a donee's powers, unless the document specifically states this.

## **Court of Protection Receiver**

Up until October 2007, the Court of Protection can substitute its own decisions for those of a person it is satisfied is incapable, by reason of mental disorder, of managing and administering his/her property or affairs. This power is limited to intervening only in respect of the individual's financial and property matters. It does not have any authority to intervene in respect of the individual's health or personal welfare. Where such intervention may be necessary the High Court's inherent jurisdiction must be invoked (an application for declaratory relief).

The High Court can also appoint a receiver under the Supreme Court Act, s37, within declaratory relief proceedings, in the best interests of the defendant, without the applicant having to go through the Court of Protection regime under the Mental Health Act (see *Sunderland City Council v PS and CA*).

Under the current (pre-October 2007) statutory regime the current Court of Protection can make orders or such directions as are necessary to control and manage the property or finances of the incapacitated individual. This includes the power to appoint a receiver to manage the person's property and financial affairs on a daily basis. The scope of each receiver's substitute decision-making powers will be set out in full on the order appointing them as the receiver. Any matters which fall outside the scope of the order given must be referred for consideration by the Court of Protection.

From October 2007 the current Court of Protection regime and the role of receiver will cease to exist. Those currently acting as Court of Protection receivers will continue in their role as substitute decision-maker for the incapacitated adult in respect of their property and financial matters, but will become property and financial Deputies under the control of the New Court of Protection. Receivership under the Supreme Court Act is not being altered, however.

## **New Court of Protection**

The Mental Capacity Act 2005 establishes a new Court of Protection with wider powers to intervene and make declarations regarding best interests and to make financial and property related decisions in substitution for those of the incapacitated adult. From October 2007 the Court of Protection will have specific authority to make decisions on behalf of incapacitated persons over the age of 16 in respect of financial and property matters and, for the first time, declarations about the incapacitated person's health and personal welfare, once the age of 16 is reached. The new Court will continue the declaratory relief jurisdiction of the High Court in relation to incapacitated adults.

It can:

- Confirm the legitimacy of another's person/body's decision to act or withhold action in respect of an incapacitated person, by making a declaration;
- Appoint a named person to act as Deputy of the Court and make decisions in respect of the individual under the authority of the Court.

The Act also sets out clear limitations on the Court's ability to make decisions or authorise anyone else to make decisions in respect of an incapacitated person. For instance the Court can not:

- Make a decision for anyone where they believe that person has capacity on that issue;
- Overturn a valid and applicable advance decision;
- Enforce an advance decision for positive treatment; or
- Make a substitute decision concerning an individual's -
  - family relationships, including consent to marriage or civil partnership, sexual relationships, divorce, placing a child for adoption, taking over parental responsibility for a child, or consent to fertility treatment;
  - consent to treatment for mental disorder of people who are liable for detention and treatment under the Mental Health Act 1983;
  - authorise the casting of a vote at an election or a referendum on behalf of a person lacking capacity to vote.

In addition to these limitations imposed by the Act, the Code and the Rules of the Court state that the Court will be expected to comply with the key principles of the Mental Capacity Act, including that any intervention should only be authorised after consideration as to whether it is the least restrictive measure that is appropriate. For that reason the Court is expecting to be used as a last resort to resolve intractable disagreements or very serious justiciable matters (i.e. matters capable of legal consideration). Where the Court is required to make an order, the Code clarifies that single orders are preferred over those that would allow for continued intervention, unless this is necessary.

## **Court of Protection Deputy**

From October 2007 the new Court of Protection will have statutory authority to appoint, where necessary, any individual aged 18+, to make decisions on behalf of an incapacitated person. Where the power relates solely to the incapacitated person's property and affairs a trust corporation may also be appointed a deputy. The named person can be a friend or relative of the incapacitated person or the holder of a specified position or office, eg. the director of social services in the area, but the order must name the individual rather than the office. Again an appointed Deputy becomes the agent of the incapacitated adult and should be treated by

others as the principal for those decisions within his/her power to make. It is envisaged that Deputyship will be used where the incapacitated person requires regular and long-term substitute decision-making, but lacks the necessary capacity to appoint someone as their agent under a Lasting Power of Attorney.

For this reason the Mental Capacity Act and Code imposes similar safeguards against abuse as are in place in respect of those acting under a Lasting Power of Attorney.

Again any deputy must act/make decisions only within the scope of the powers given to them by the Court of Protection and, when so acting, must do so with according to the principles laid out in s1 of the Act and Code.

Whilst they are entitled to reimburse themselves for any expenses out of the principal's estate they must, where ordered by the Court, provide a security and submit reports to the Public Guardian.

A Deputy is unable to override a lawfully-made decision of a donee acting under a Lasting Power of Attorney and the Court can not authorise a deputy to make decisions which would prevent a person from having contact with the incapacitated adult or change the named person responsible for the individual healthcare, as these are decisions for the Court alone. Specific limitations to a Deputy's powers are set out in section 20 of the Mental Capacity Act including prohibiting a deputy from refusing life-sustaining treatment for the principal, making a substitute decision which would amount to restraint of the principal (unless additional safeguards are met including that the act is expressly within the powers given to the Deputy by the Court) or a deprivation of the principal's liberty. Nor can a deputy act for their principal in matters which by statute require the principal's capacitated personal authorisation, eg. signing a will.

## **Others with specific limited powers of substitute decision making**

### **A Department for Work and Pensions Appointee**

Where someone entitled to claim welfare benefits is deemed "unable to act" as a result of a physical or mental incapacity, an "appointee" may be given the authority by the DWP to manage the incapacitated person's welfare benefit claim. They must be suitable to do the duties required of them. A suitable appointee is:

- acceptable to the claimant
- capable of managing the claimant's affairs and can be trusted to do so in the interests of the claimant
- in regular contact with the claimant and has enough knowledge of the claimant's circumstances to notify the authority of relevant changes of circumstances and answer authority enquiries
- fully aware of the responsibilities of being an appointee, for example aware they are responsible for repaying overpaid benefit
- someone who has no potential for a conflict of interest

Appointees are responsible for finding out what benefits the incapacitated person is entitled to, completing and submitting the application as if they were the person and informing the DWP of any change in the person's circumstances. In addition the

appointee must carry out all instructions they receive including receiving benefits in their own name on behalf of the person and ensure that the money is used for that person's welfare. Appointees are authorised to act on behalf of the incapacitated person in relation to the management of their welfare benefit entitlement only, so do not have powers in relation to bequests, lottery wins, etc. They do not have the same responsibilities or liabilities as those acting under a Power of Attorney or deputyship.

### **Those acting in connection with the care and treatment of an incapacitated person**

The Mental Capacity Act introduces a statutory protection against civil and criminal prosecution for those required to act or substitute their decision-making for the incapacitated person, where this is done in connection with the care or treatment of an incapacitated adult and the person acting reasonably believed the individual thereby assisted, lacked capacity on the issue. In addition, to benefit from this protection, the person acting must have complied with the principles set out in s1 of the Act and the Code. In particular they must have a reasonable belief that the act/ decision is in the person's best interests. The term 'acts in connection with the care or treatment' is not defined. The Code explains this left deliberately wide, so that both informal, paid carers and public bodies are able to rely on this protection. No *statutory* defence exists where substitute decisions/acts are:

- in contravention of a lawful decision made by a deputy or a donee acting under a Lasting Power of Attorney
- done contrary to an apparently valid and applicable advance decision
- negligently performed
- amounting to restraint (unless additional safeguards are met)
- amounting to a deprivation of the incapacitated person's liberty.

But the defences may still exist at common law. The Act does not deal with what becomes of the common law defence of necessity. The answer to this conundrum can only be confirmed by the Court of Protection, or an ordinary court in an action for assault or some other civil law wrong, or a criminal court.

### **Conclusion**

Therefore, before accepting the authority of a substitute decision-maker, it would be prudent to check:

- the type of authority they are seeking to act under, eg. a Power of Attorney, Deputyship, ordinary common law appointment as an agent, a co-signatory of an account, an appointeeship etc.;
- if this is a power which is required to be in a certain format, obtain a copy of the document conferring the power so that it is possible to ascertain whether it has been properly executed and, where necessary, registered;
- whether the decision being made is one the holder has authority to make, ie. does the document give welfare/ health substitute decision-making powers and *specific* authority to refuse life-sustaining medical treatment where this is what is being asserted.
- whether the holder's authority has been revoked in any way (for revocation of a Lasting Power of Attorney see s13 MCA, the LPA Regulations, which

impose notification requirements, and MCA schedule 4 in respect of Enduring Power of Attorney).

- whether the substitute decision-maker is acting in compliance within their duties as set out in the Act and Code of Practice.
- whether there is any evidence on which one might form the view that the agent is not acting in the best interests of the individual or may be influenced by an obvious conflict of influence.

### **Other Information sheets in this series include:**

2. The Mental Capacity Act 2005: Lawful restraint or unlawful deprivation of liberty?
3. The Mental Capacity Act 2005: Paying for necessities and pledging credit
4. The Mental Capacity Act 2005: Statutory Duties to Accommodate

## Housing LIN INFORMATION SHEET: MCA – no. 2

### The Mental Capacity Act 2005: Lawful restraint or unlawful deprivation of liberty?

*This information sheet is one of four that accompanies the Housing LIN factsheet Housing Provision and the Mental Capacity Act 2005*

Whilst the new Act permits individuals to carry out acts for or on behalf of an incapacitated person where these are in connection with the incapacitated person's care or treatment, it does not provide any statutory protection for a deprivation of the person's liberty. In addition any action which might result in a restraint on the incapacitated person's freedom will not attract protection from liability unless:

- the person taking action reasonably believes restraint is *necessary* to prevent *harm* to the person who lacks capacity, and
- the amount or type of restraint used and the amount of time it lasts must be a *proportionate response* to the likelihood and seriousness of harm. This will mean using the least intrusive type and minimum amount of restraint to achieve a specific outcome in the best interests of the person who lacks capacity.

Restraint is defined as using force or threatening to use force to secure the doing of an act that the person resists, or the restriction of the person's liberty of movement, whether or not s/he resists. The Code of Practice recommends restraint is used only as a last resort or in exceptional circumstances. The way in which it might be used must be recorded in a person's care plan or the decision maker's other records and all instances when restraint is actually used should be recorded in the case notes or file.

It can be difficult for providers to determine whether a course of conduct they deem necessary to prevent harm amounts to restraint, and therefore lawful if they can establish it is proportionate, or to a deprivation of liberty and therefore outside the protection given by the Act. The distinction is important from a practical point of view as the Code makes clear that anyone depriving an incapacitated person of their liberty is outside the protection of the Act regardless of whether they are a public authority. Deprivation of liberty will usually amount to false imprisonment, a civil law wrong, so anyone doing it could be made liable for any damages which could be awarded to the incapacitated person – unless a Court finds there to have been a lawful excuse.

Unfortunately neither the Act or Code of Practice further define a deprivation of liberty, but case law does offer some guidance as to what could amount to a deprivation of liberty. The European Court of Human Rights in *HL v The United Kingdom* identified the following as factors contributing to deprivation of liberty:

- physical or chemical restraint was used to admit a person resisting admission
- professionals exercised complete and effective control over care and movement for a significant period
- professionals exercised control over assessments, treatment, contacts and residence
- the person would be prevented from leaving if they made a meaningful attempt to do so
- a request by carers for the person to be discharged to their care was refused
- the person was unable to maintain social contacts because of restrictions placed on access to other people
- the person lost autonomy because they were under continuous supervision and control.

In a recent case, *DE* [2006], the High Court considered as a preliminary issue whether the respondent authority had deprived Mr E of his liberty. Mr E had been accommodated by the local authority, following emergency intervention to safeguard his welfare. Without any formal assessment of capacity, and despite the presumption of capacity, even for people who have had a stroke, the authority kept Mr E in the home, no doubt because they did not consider it feasible to provide for him if he were to return to the care of his wife, who had mental health difficulties of her own. Mr and Mrs E made repeated requests that he be allowed to return home; however, the local authority relied on the doctrine of necessity as authority to refuse this request over a 9 month period and informed Mrs E that they would notify the police were she to make attempts to remove him from their care.

The judge stated that a person can be as effectively “deprived of his liberty” by the misuse or misrepresentation of even non-existent legal authority as by locked doors and physical barriers, and held, in this case, that such a misrepresentation of the law had amounted to a deprivation of liberty as the local authority were aware that it would have the effect of preventing Mr E in getting help from his wife and from exercising his freedom to leave. The absence of locked doors or chemical restraint and freedom to see relatives on the premises did **not** mean that there was no deprivation of liberty.

Therefore for a deprivation of liberty to occur there must be both an *objective* element, i.e. a person’s confinement in a particular restricted space for a not negligible length of time and a *subjective* element, namely that the person has not validly consented to the confinement in question. When considering the *objective* element, account must be taken of the **type, duration, effects and manner of implementation of the measure** in question. The distinction between a deprivation of and a *restriction* upon liberty is merely one of degree or intensity, and **not one of nature or substance**. The key factor is whether the person **is, or is not, free to leave**. Do those treating and managing the person exercise **complete and effective control** over the person’s care and movements? As regards the *subjective* element, where a person **has** capacity, consent to their confinement may be inferred from the

fact that the person does not object. Express refusal of consent by a person who has capacity will be determinative of this aspect of 'deprivation of liberty'. No such conclusion may be drawn in the case of a patient **lacking** capacity to consent. The fact that an incapacitated person may have 'given himself up' to the regime does not mean that he has consented to his detention.

Much can be done by providers and commissioners of care through best practice to reduce the risk of deprivation of liberty by minimising restrictions and ensuring that decisions are taken involving the person concerned and their carers. Elements of good practice that are likely to assist in this, and in avoiding the risk of legal challenge, include:-

- Ensuring that decisions are taken (and reviewed) in a structured way and that reasons for decisions are recorded. Protocols for decision-making should include safeguards against arbitrary deprivation of liberty.
- Effective, documented care planning (including the Care Programme Approach, Single Assessment Process, Person Centred Planning, and Unified Assessment as relevant) for such people, including appropriate and documented involvement of family, friends, carers (both paid and unpaid) and others interested in their welfare.
- Proper assessment of whether the patient lacks capacity to decide whether or not to accept the care proposed. In accordance with the principles of the Mental Capacity Act 2005, and Chapter 3 of the related Code of Practice, a person should not be taken to lack capacity to make a decision unless they have been given support to make the decision in question. If the person has capacity to do so, they should be supported to make decisions about their own care. It is also important to identify if a person's condition has deteriorated and they no longer have capacity to consent, and to ensure that decision-making complies with the Mental Capacity Act 2005, including consideration of whether they are deprived of liberty.
- Ensuring, as required by the fifth principle of the Mental Capacity Act 2005, that alternatives to admission to hospital or residential care are considered and that any restrictions placed on the person while in hospital or residential care are kept to the minimum feasibly required and necessary in all the circumstances of the case.
- Ensuring appropriate information is given to the person themselves and to family, friends and carers. This would include information about the purpose and reasons for the admission, proposals to review the care plan and the outcome of such reviews, and the way in which they can challenge decisions (eg through the relevant complaints procedure). The involvement of local advocacy services where these are available should be encouraged to support patients and their families, friends and carers.
- Taking proper steps to help the person retain contact with family, friends and carers. If, exceptionally, there are good reasons why maintaining contact is not in the person's best interests, those reasons should be properly documented and explained to the people they affect. It should be made clear how long the restrictions will be maintained and how the decision can be challenged.
- Ensuring both the assessment of capacity and the care plan are kept under review. It may well be helpful to include an independent element in the review. Such a

second opinion will be particularly important where family members, carers or friends do not agree with the authority's or provider's decisions. But even where there is no dispute, all involved must ensure their decision-making stands up to scrutiny and complies with the principles of the Mental Capacity Act 2005.

## Conclusion

Despite the provisions of the Mental Capacity Act, distinguishing between restraint and deprivation of liberty, and the express withholding of the s5 protection from liability for acts amounting to a deprivation of liberty, and the Bournemouth proposals for care home or hospital deprivation of liberty currently undergoing Parliamentary consideration, it is now clear that the High Court or Court of Protection **can** authorise deprivation of liberty without acting in breach of the European Convention or the UK's Human Rights Act. Effectively, the *Bournemouth* gap has now been closed by the development of the declaratory relief jurisdiction.

The precedent for this proposition is the judgment of Mr Justice Munby in *Sunderland City Council v PS and CA*, 2007. But the Court must itself comply with the MCA and the Human Rights legislation, including principles of proportionality and necessity. This means that judicial authorisation is sought for deprivation of liberty, attempts must always be made to identify ways to meet the person's needs in a less restrictive way. A judicial authorisation for deprivation of liberty is not an alternative to the proper application of the rest of the Mental Capacity Act 2005.

The judge suggested that if one needs to deprive someone of their liberty

- i) The detention must be authorised by the court on application made by the proposed detainer **before** the detention commences.
- ii) Subject to the exigencies of urgency or emergency the evidence must establish unsoundness of mind of a kind or degree warranting compulsory confinement.

In other words, there must be evidence establishing at least a prima facie case that the individual lacks capacity and that confinement of the nature proposed is appropriate.

- iii) Any order authorising detention must contain provision for an adequate review at reasonable intervals, in particular with a view to ascertaining whether there still persists unsoundness of mind of a kind or degree warranting compulsory confinement.

He implied that granting what's called 'liberty to apply' to court on notice could achieve this sort of review.

## **Other Information sheets in this series include:**

1. The Mental Capacity Act 2005: Substitute Decision-making and Agency
3. The Mental Capacity Act 2005: Paying for necessities and pledging credit
4. The Mental Capacity Act 2005: Statutory Duties to Accommodate



## Housing LIN INFORMATION SHEET: MCA – no. 3

### The Mental Capacity Act 2005: Paying for necessities and pledging credit

*This information sheet is one of four that accompanies the Housing LIN factsheet Housing Provision and the Mental Capacity Act 2005*

The Mental Capacity Act 2005 affords those acting 'in connection with the care or treatment' of someone who lacks capacity protection from legal liability or prosecution provided they have acted in a way consistent with the Act and Code of Practice. The Act has also made two further specific provisions to assist those caring for a person who lacks capacity where their care requires the purchase of goods or services.

Section 8 says that if an act to which section 5 applies involves expenditure, it is lawful for a person to **pledge the incapacitated person's credit** for the purpose of the expenditure.

Section 7 imposes a liability to pay 'a reasonable price' on the incapacitated person in any event, when that person is *supplied with necessities*.

#### **Pledging a person's credit**

Previously this term was used to describe the legal protection afforded to abandoned women who, in a less enlightened age, did not count as persons in their own right in the legal system so could not make contracts. A wife who was abandoned by her husband had a right to pledge the credit of her spouse, so that she and the children could survive. It meant that she could foist legal responsibility to pay for food and shelter onto her husband – promise *for* him, in effect - because she was not capacitated in her own right to make purchases.

It is therefore reasonable to assume that this section is intended to mean that a carer can make the incapacitated person legally liable for a purchase, by extending a promise that she or he (the incapacitated person) will pay, to the vendor.

The carer can only represent to a vendor that this pledging power is applicable, when purchasing something **in connection with the care or treatment** of the incapacitated person (this is the broadest ambit of the acts covered by s5). But since the word 'care' is not defined, there is a danger that the person may have some things bought for them that some think have nothing to do with their care at all, but

would be seen to be connected in the view of the *carer*, without the carer necessarily forfeiting a claim to having acted with a reasonable belief. An example might be highly popular items which many members of the public believe work to relieve pain because a celebrity has endorsed them, but as to which there is no established scientific evidence.

The Code recognises that this apparent promise may not be good enough for a supplier, in which case the Code recommends that formal steps will have to be taken to acquire legal control of the person's assets, and mentions getting a Single Order from the Court of Protection.

## Supplying a person with necessities

Secondly, section 7 imposes a liability to pay a reasonable price on the incapacitated person in any event, when that person is supplied with necessities.

The law before the new Act formally becomes law is that when a person has something essential sold and delivered to him or her, with the vendor intending sale for payment, but the recipient is incapable of forming a contract because of a basic lack of understanding the pros and cons, the vendor has a right of action for payment of a **reasonable sum**, regardless of the enforceability of any *actual* contract between consenting parties.

This section goes wider than the current law, and makes the person pay, whenever such goods or services are supplied – potentially, it seems, without even any attempted involvement of the incapacitated person in the particular purchase.

“Necessary” is defined by the Act to mean ‘suitable to a person's condition in life’ (ie his normal lifestyle) and to the person's ‘actual requirements at the time when the goods or services are supplied’. Earlier case law interprets this generously – in one case about a person whose living came from letting properties out (although lacking mental capacity) the court held that the accountancy fees for dealing with the tax on the rental income, and the renovation fees of the properties were all ‘necessaries’.

The Code of Practice provides further guidance as to what would be considered necessities. At paragraph 5.54 it explains that “...*while food, drink and clothing are necessary for everyone, the actual requirements for the type of food or the style or amount of clothing will vary according to the person's individual circumstances or “condition in life” ... if a person who now lacks capacity had always bought expensive designer clothes, s/he should be able to have them replaced with similar quality clothes as necessary goods. However such clothes would not be necessary for a person who usually wore cheap jeans and T-shirts.*” And at para 5.55: “Goods will not be necessary if the person's existing supply is sufficient. So, for instance, one pair of shoes (or possibly two pairs) bought for a person lacking capacity to buy them for him/herself would be considered necessary, but a dozen pairs would probably not be necessary.” However, it may be that the statutorily required person-centred approach to the person's attitude to shoes, prior to losing capacity could suggest that numerous pairs of shoes were important to that person.

The goods and services limitation in s7 means that the duty to pay a reasonable sum can only apply to those types of things. Housing has been held to be neither goods

nor services, in the broader legal framework. So s7 does not provide an obvious legal route to recovery of a reasonable rent payment by a landlord against an incapacitated tenant, however necessary the accommodation might have been.

However, at common law, before the new Act, anyone occupying premises not owned by them, owes compensation to the landowner, for use and occupation. Tenancies could therefore be arranged without signature, and such compensation could continue to be claimed, so long as the landlord was

- a) happy to take on tenants who could not understand the covenants in the tenancies and would not be able to be made liable for breakages or other damage.
- b) happy to contemplate formal legal proceedings against an incapacitated person for recovery of the sum claimed, including use of a litigation friend under the Civil Procedure Rules.

Putting the effect of the new law as simply as possible, landlords may still choose to rely on this existing common law right to compensation for occupation of their premises. But there are other ways of ensuring payment of the rent. The occupant cannot acquire a legal liability to pay a reasonable rent under s7, because the shelter and housing is not able to count as necessary goods or services (whereas the charge for the support or care services could be legally due, despite the recipient's mental incapacity, under s7). If the person's carer 'pledges' the incapacitated person's 'credit' under s8, then **that promise to pay the rent will constitute a legal liability on the part of the incapacitated person** to pay whatever rent has been charged, and for breakages or other damage if included in that pledge (regardless of whether the accommodation is suited to the person's condition in life). Use of either route will still mean that actually getting the money or possession of the property back, will be subject to the rules on suing an incapacitated person in the courts.

Section 5 carers may think that they are able to sign tenancies and manage bank accounts under the doctrine of best interests. But there are some actions and decisions that are implicitly NOT able to be done by people whose **only** status is **as a person acting in connection with care or treatment**. This is implied by the existence of s18 of the Act, which lists things that the Court has jurisdiction to order in the realm of property and affairs. This includes:

- Control and management of the person's land or property
- Sale, exchange, mortgaging, gifting etc of the person's land or property
- Acquisition of property on the person's behalf

This list does not mean that the things on it could not be put in a **Lasting Power of Attorney** – or given to a deputy to do; most of those listed could legitimately be done by both sorts of agent. But if the person has already lost capacity to appoint someone with such a power, and there is no application for deputyship (even assuming that the thing authority is wanted for is something a deputy can in fact do), **ordinary carers must not think that s5 makes lawful literally anything that would be useful or convenient even assuming it to be in the person's best interests.**

## **Other Information sheets in this series include:**

1. The Mental Capacity Act 2005: Substitute Decision-making and Agency
2. The Mental Capacity Act 2005: Lawful restraint or unlawful deprivation of liberty?
4. The Mental Capacity Act 2005: Statutory Duties to Accommodate



## Housing LIN INFORMATION SHEET: MCA – no. 4

### The Mental Capacity Act 2005: Statutory Duties to Accommodate

*This information sheet is one of four that accompanies the Housing LIN factsheet Housing Provision and the Mental Capacity Act 2005*

Numerous statutes authorise various public bodies to provide accommodation where the individual meets the eligibility criteria.

Which body has the principal duty will depend on the type and level of assessed need, which statute takes precedence, and may also depend on whether the duty imposed by statute is a power, a ‘target’ duty or one that can be enforced by an individual against the public body.

This fact sheet will detail the different public bodies responsible for providing accommodation, the matters they will be required to take into consideration when assessing eligibility, and specific considerations for those who lack, or may lack, capacity.

### The Health Service

There are two main statutory provisions which empower a health body (PCT or other Trust) to provide accommodation. The first of these provisions is set out in s117 of the Mental Health Act 1983. This section imposes a duty on the health service (as well as the relevant local authority’s social services department) to arrange appropriate accommodation as part of a package of aftercare support for anyone who is discharged from hospital, or released on temporary leave of absence, following a period of detention under the Mental Health Act 1983. The duty under s.117 of the MHA is not discretionary and it is unlikely that either public body could successfully defend any non-provision purely on the basis of their lack of financial resources. However, an authority may have lawful justification for not providing accommodation where they are able to establish that, despite using all reasonable endeavours, they are unable to identify or procure “appropriate” accommodation.

Section 3(1) National Health Service Act 2006 entitles health bodies to provide hospital accommodation or any other accommodation for the purpose of any service normally associated with the treatment or prevention of illness. This is a target duty which means that it is a duty owed to the community at large and that no single individual can compel the health authorities to provide accommodation under this.

It is central government's policy that those people with a 'primary health need', as explained in government guidance, should be entitled to such accommodation and all services, funded by the health service, and this is known as 'continuing NHS health care'. There is no right to choose accommodation provided under this eligibility status, but the NHS must make reasonably appropriate selections for the client's needs, and is equally subject to the Human Rights Act when so doing, as a local authority would be.

An individual who lacks capacity to decide where to live or capacity to undertake the responsibilities of a tenancy may also have physical or mental health difficulties and could qualify under these statutes. Consideration should therefore be given to the health authority's duties or powers to provide assistance. Any provision under these statutes is not reliant on an assessment that the individual has capacity to accept the offer or any terms attached to the offer of accommodation, because the arrangement made with the provider is a contract between the public body and the provider. Also, if the health body does arrange accommodation, this must be provided free of charge to the individual.

## **Local Authority Housing Departments**

Under the Housing Act 1996 a local authority housing department will owe a duty to provide suitable accommodation to a homeless person, and anyone reasonably expected to live with them, provided that the person is able to establish that they are eligible, homeless or threatened with homelessness, in priority need and the local authority can not establish that they are intentionally homeless or have a stronger local connection elsewhere.

### **Eligibility:**

The Housing Act 1996 excludes certain persons from abroad from eligibility for support. Therefore in order to qualify an individual would need to show that he is not within any of the categories of persons so restricted. A British citizen or citizen of an EEA state would qualify, as would most persons from abroad with leave to remain in the UK provided this wasn't granted on the basis that someone else gave an undertaking to maintain the individual, or the leave prohibits recourse to public funds. Someone else, who would normally expect to reside with the ineligible person, can make the application in their own right but they would then need to show that they are in priority need and homeless or threatened with homelessness.

### **Homeless / threatened with homelessness:**

Emergency accommodation should be made available to those eligible and in priority need where they can establish that they are actually homeless or are likely to become homeless within 28 days.

### **Priority need:**

A person who is vulnerable as a result of old age, mental illness or learning difficulty, physical disability or other special reason has priority need status, this includes those who lack capacity. However, the court in *R v Tower Hamlets London Borough Council, Ex Parte Ferdous Begum* (1993) confirmed there is no duty under the Housing Acts owed to children or disabled persons who had neither the capacity to

make an application themselves or to authorise an agent to make an application on their behalf.

This case established that the LA's duty under the Housing Act 1996 is to "make an offer of permanent accommodation" for those in priority need who must then decide whether to accept or reject the offer of assistance. The Court held that whilst the Housing Act afforded disabled persons and their carers priority need status there was "*no purpose in making an offer of accommodation to a person so disabled that he is unable to comprehend or evaluate the offer. If a person is so incapacitated that he can not [accept the offer and undertake the responsibilities that are involved] he is not left destitute but protected by the National Assistance Act 1948.*"

It is unclear whether this principle would be upheld today in light of the introduction of the Human Rights Act, but no case has as yet over-ruled the binding force of this decision.

The Housing Act 2002 goes some way to amend this position in that it allows that where someone lacks capacity to make the application in their own right, someone who can **reasonably be expected to live with them** can make the application for housing relying on their incapacity as a qualifying 'special reason' for priority need status.

It is as yet unclear whether a person with a welfare and finance/property LPA will count as if they were actually the incapacitated person and thus be able to apply.

In addition, the Mental Capacity Act 2005 sets out very clear obligations on Local Authority decision makers to undertake all reasonable methods to maximise a person's ability to make a capacitated decision before determining that they are incapacitated. The local authority housing department will also need to bear in mind the obligations imposed by the Disability Discrimination Act 1995. It may be acting unlawfully by refusing to provide accommodation to someone who lacks capacity where this is due to a disability unless they can show a justifiable reason as set out within the 1995 Act, for example they were unable to understand the nature of the contract of accommodation.

Even where the individual can not be assisted to make a capacitated decision, and there is no one able to make an application on his behalf (either as an agent of the person or because they can reasonably be expected to live with the incapacitated person), the housing department will still have an obligation to work closely with other statutory and voluntary bodies within the CPA to ensure that those within mental health client groups or otherwise incapacitated are not at risk of homelessness and are adequately and appropriately housed as set out in the current Homelessness Code of Guidance for Local Authorities issued by the Department for Communities and Local Government.

### **Intentionality:**

It is for housing authorities to satisfy themselves in each individual case whether an applicant is homeless or threatened with homelessness whether this situation has arisen due to acts or omissions carried out by the individual intentionally. Generally, it is not for applicants to "prove their case" unless the applicant is seeking to establish that, as a member of a household previously found to be homeless intentionally, he or she did not acquiesce in the behaviour that led to homelessness.

In such cases, the applicant will need to demonstrate that he or she was not involved in the acts or omissions that led to homelessness, and did not have control over them.

Therefore, because it is the local authority who have responsibility for determining a person's capacity in respect of action or omissions which lead to homelessness, and because any decision would be subject to challenge and judicial scrutiny, those responsible for assessing capacity would be wise to follow closely the guidance set out in the Code of Practice accompanying the Mental Capacity Act. They should seek to establish beyond reasonable doubt that the person had full capacity when carrying out the act/ omission, or agreeing to the actions of another, which resulted in their homelessness. In addition, anyone with responsibility for the care or treatment of a person who may have been made homeless as a result of their incapacitated actions should also give consideration to obtaining legal advice for the individual to ascertain whether the possession order could be set aside. They could also make detailed representations on the issue of capacity to the housing authority, both in terms of actions that lead to the person's homelessness and their ability to undertake a tenancy or licence.

### **Local Connection:**

Unlike ordinary residence a person's local connection is not determined by where they choose to live; instead it is determined by the facts of any particular case. A local authority housing department can, where they believe the facts establish that an applicant has a stronger local connection elsewhere, make a referral to the other area's housing department to provide accommodation. If the other housing authority can reasonably refuse the referral then it is for the original housing department to accommodate.

Any duty under the Housing Act 1996 is discharged if, after the local authority housing department has made a *reasonable* offer, the capacitated person rejects the provision. Those who are vulnerable or lacking capacity therefore need access to advice about challenging the suitability of the offer, on appeal, in public law terms.

Similarly capacity will have to be very carefully considered when a housing provider is seeking to withdraw a service and discharge their duty as a result of the unreasonable behaviour on behalf of the service user. The local authority will need to establish that the person was acting with capacity when carrying out any purported unreasonable act. In assessing this the authority must give careful consideration of their duties as set out in the Mental Capacity Act and Code of Practice and clearly record any evidence establishing capacity. The individual should also be given the opportunity to respond to any allegation.

The local authority housing department may also have obligations under the Disability Discrimination Act 1995. Under the 1995 Act it is unlawful to discriminate without justification against disabled people, including those suffering from a mental incapacity, in the selling, letting or management of residential premises. This includes making special arrangements regarding the allocation of properties to those with disabilities, initiating possession proceedings, limiting the use of any facilities or access to benefits on the basis of their impairment. This is lawful only if justified by one of the provisions in the DDA e.g. health and safety, the restriction is necessary for other occupiers etc. It is not a justification that the discrimination was in the person's best interest. Prior to issuing possession orders against those who have a

disability the Courts have given careful consideration as to whether any purported breach of the tenant's obligation was linked to their disability and, where this is found to be the case, whether a possession order is justified under the 1995 Act.

For example, in *North Devon Homes v Brazier* [2003] the High Court refused to issue a possession order against a tenant with a psychotic disorder as the landlord had not put forward any evidence that her unreasonable behaviour (use of abusive language and gestures towards her neighbours and excessive nightly noise) put the physical health and safety of the neighbours at risk.

In another case, *Manchester County Council v Romano* [2004] a possession order was granted against a tenant despite their diagnosis of a depressive mental illness as the local authority landlord had been able to show that the unreasonable behaviour (loud hammering and music throughout the night) had endangered the health and safety of the neighbour (a driving instructor who suffered from sleep deprivation as a result of the noise.) The Court of Appeal also questioned whether the behaviour was linked to the tenant's mental illness.

The courts are very clear that a local authority's housing department can not withdraw all services from those they assess as lacking capacity. They may still owe a duty under the Housing Act 1996 to advise and assist an individual to find appropriate accommodation or may be asked to co-operate with the local authority's social services department, under s.47 of the NHA and Community Care Act 1990, to assist them to discharge their duties under community care legislation.

## **Local Authority Social Services Department**

Section 21 of the National Assistance Act 1948 imposes a duty on local authority social services departments to provide accommodation to anyone over 18, in need of care and attention as a result of age, illness, disability or any other circumstance. These powers and duties are residual; they arise only where the person's needs for care and attention are not met by any other provision (either statutory or voluntary).

For this reason a local authority is able to take into account an individual's resources, subject to a threshold cap. Likewise the local authority social services department is required to consider the individual's capacity to arrange their own accommodation. Where the individual is assessed as lacking the required capacity to make their own arrangements and no other person or body has authority or is willing to make such arrangements, the local authority is likely to have a duty to make such arrangements, irrespective of the individual's resources.

Whilst a local authority social services' duty to arrange and/or fund accommodation in a residential or care home setting is well understood, consideration must also be given to the local authority social services department duties to provide ordinary accommodation under community care legislation. The courts are careful to stress that the Housing Act legislation remains the principal piece of legislation for establishing a duty to accommodate. However, there is clear provision within community care legislation, notably s.21 of the National Assistance Act 1948, s17 Children Act 1989 and s.2 of the Local Government Act 2000, which does empower a social services department to provide ordinary accommodation.

For example, where a community care assessment identifies 'ordinary accommodation' as an assessed need and this need will not be met within the required timeframe or at all by the housing department, then a duty to meet this need will arise and it will be for the local authority's social services department to meet this need. Under this power, local authorities actually hold the contract with the housing provider, rather than the individual service user holding it. If they were to place an individual who needs help with bodily functions into an Extra Care housing setting, the arrangement would be liable to registration as a care home under the Care Standards Act. Thus local authorities cannot do this. They must either place the individual in a registered care home, or facilitate a person who needs accommodation and care into a tenancy and then provide domiciliary care. In this scenario, the person would have the contract with the housing provider and therefore all the principles in relation to capacity and signing a tenancy come into play.

As with any provision under community care law, the social service department will need to consider as part of their assessment whether the care plan that is identified is appropriate in that it meets the eligible needs in a way that respect the individual's rights under the Human Rights Act 1998 and the local authority's statutory duties, without acting outside of their statutory powers. Where a person rejects a reasonable and appropriate offer of assistance the local authority will need to identify clear evidence that they did so with full capacity, including an understanding of the consequences, because it would be a breach of the duty to meet need, and possibly negligent, to ignore potential incapacity.

A local authority can lawfully withdraw services where a capacitated person refuses a reasonable and appropriate offer.

Where a person's carer is seeking to refuse services on another's behalf the local authority should confirm that there are no adult protection concerns before disengaging – this will involve ensuring that the 'refuser' is able and willing to make arrangements to meet the shortfall in needs him or herself.

Again, a vulnerable or incapacitated person will need access to advice about challenging the suitability of the offer, or any withdrawal of such offers, in public law terms.

## **National Asylum Support Service (NASS)**

Certain categories of persons from abroad are excluded from support from a local authority housing or social service department, in such circumstances they are able to apply for accommodation and subsistence support to NASS, who have a statutory duty to make available appropriate accommodation for them and any dependants.

Offers of accommodation are usually made following an allocation process which involves dispersal of the individual, and their dependants, to areas not suffering from housing shortages. However it is possible to make representations to NASS against dispersal where an individual or dependant has an important link to an area, particularly if that link involves education or complicated medical treatment or therapy.

The duty to provide accommodation is not dependent on any assessment of the individual's capacity, if the individual lacks the capacity to make an application this can be made on their behalf by anyone. Similarly any offer of accommodation must be appropriate. Therefore, if the person lacks the capacity to undertake responsibilities associated with independent living then alternative arrangements must be put in place by NASS.

## **IMCA Rights and Changes in Accommodation**

IMCA rights in the context of NHS-arranged accommodation arise only when the arrangements are made for accommodation *in* (or to another) hospital or care home.

With regard to accessing supported housing, it is clear that a proposed move from registered residential care to independent living will hardly ever trigger IMCA rights.

For those IMCA rights to arise, s39(2)(a) MCA has the effect that the local authority would have to be acting in accordance with the National Assistance Act when making the arrangements – i.e. actually contracting for a placement in the unregistered supported accommodation, directly with the landlord.

This is not common in either Extra Care or supported living accommodation settings (although it is lawfully *possible*, so long as the person has no need for personal care of the nature of assistance with bodily functions).

Logically, if a person needing supported accommodation has the mental capacity to understand and consent to a tenancy for him or herself, then no IMCA would be appropriately involved, because the right to the appointment of an IMCA depends on *lacking* capacity.

For those persons who *lack* capacity regarding the matter of the tenancy, but are seemingly likely to benefit from a move to supported accommodation, an IMCA's involvement may well strike all concerned as likely to be *helpful*.

But even if the fact that the grant of the tenancy is being *facilitated* by a social services department, constituted the 'making [of] arrangements', as the trigger to entitlement is worded, under s39(1)(b) of the MCA, and such facilitation was 'in accordance with' s29 of the National Assistance Act (arrangements for promoting welfare of disabled persons), there would still need to be a *deputy* with a Single Order, or an *attorney*, involved, in order formally to agree to the signature of the tenancy, before it could be regarded as made.

Any such person would always have a better claim to involvement in decision-making in this sort of tenure-related matter than an IMCA.

Hence the *other* essential to the triggering of an IMCA (s39(1) - that the authority was satisfied that there is no person whom it would be appropriate to consult - would not apply.

## **Other Information sheets in this series include:**

1. The Mental Capacity Act 2005: Substitute Decision-making and Agency
2. The Mental Capacity Act 2005: Lawful restraint or unlawful deprivation of liberty?
3. The Mental Capacity Act 2005: Paying for necessities and pledging credit