

THE MENTAL CAPACITY ACT SINGAPORE (2008): CODE OF PRACTICE

Dr Chow Chiu Leung Peter

ABSTRACT

The Mental Capacity Act Singapore (MCA 2008) has a great influence upon an adult's ability to make decisions, especially if their capacity to do so is affected. Having been in force for a decade, the overarching five statutory principles remain crucial. The amendment in 2016 refined four areas of the MCA. The MCA Code of Practice is a very important and helpful resource for anyone who falls under the various provisions in the MCA: the Mental Capacity Test, the Lasting Power of Attorney, the Court-Appointed Deputy, and the Office of the Public Guardian. Being aware of the safeguards for the person lacking mental capacity (hereafter referred to as "P") so as to protect them from the LPA donees or court-appointed deputy's potential abuse of power is essential in the care of P.

Keywords: Mental capacity, lasting power of attorney, court appointed deputy, office of the public guardian, code of practice

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INTRODUCTION

In 2008, the Mental Capacity Act (MCA) was passed by Parliament and came into force in 2010. Since then, there have been numerous learning points following the application of the principles and instruments provided in the MCA by various stakeholders. In 2016, there was an amendment (the MCA Amendment 2016) to refine the operation of the Act for adults who lacked mental capacity in Singapore. While the MCA is an Act of Parliament, which is written in legal language, there is an accompanying Code Practice written in layman language for the various stakeholders to easily understand the operation of MCA.¹

This article will discuss the key instruments in both the MCA and the Code of Practice and review their updates.

DR CHOW CHIU LEUNG PETER
Consultant Geriatrician and Chairperson of the Clinical
Ethics Committee
Changi General Hospital

UPDATED CONTENT ON MENTAL CAPACITY ACT

In 2016, the Ministry of Social and Family Development (MSF) proposed an amendment of the MCA in four areas.^{2,3} These have been passed by the Parliament and incorporated in the current version of the MCA.

1. Emerging Need for Professional Donees and Deputies Services

The amendment introduced the figures of "professional donee" and "professional deputy" to serve the person who lacks mental capacity (P) without family members or close friends to act as their proxy decision-makers. The professional deputy must meet the criteria, register with the Office of the Public Guardian (OPG), and cannot be related to P. Professional donees are limited to professional deputies registered with OPG and prescribed classes of persons such as licensed trust companies.

2. Better Protect Individuals Who Lack Mental Capacity from Abuse by Their Donees or Deputies

The 2016 amendment in this area allows the courts to revoke the donee's or deputy's powers if there is significant risk of abuse or exploitation by the donee or deputy. If the donee or deputy is convicted of an offence involving dishonesty or fraud, the court can revoke the donee's or deputy's appointment in order to prevent abuse. This helps to protect P and P's assets.

3. Facilitate the Use of LPAs By Donees to Transact with Third Parties

If the third parties (e.g., bank, house buyer, etc.) have no knowledge of the non-existent, suspended, or revoked statues of the donee of a lasting power of attorney (LPA), the third parties are entitled to rely on the LPA in relation to that dealing or transaction in the same manner as if the LPA exists, non-suspended or non-revoked.

4. Improve the Operations of the Office of the Public Guardian

The current logistics of LPA application was smoothened by the 2016 amendment. The applicant fills up the form, sees an LPA certifier, and files and registers the LPA to the OPG.

Recently, in 2010, there was a minor amendment allowing the OPG to handle various transactions electronically, instead of using hardcopies. LPA applications will soon become entirely paperless.

IMPACTS OF THE MCA

The MCA is applicable to anyone in Singapore who has attained the age of 21 years. Section 3 of MCA provides five overarching general principles in handling the issue of mental capacity for an adult. They are essential in applying the instruments in the MCA (refer to **Table 1**).

1.	A person must be assumed to have capacity unless it is established that the person lacks capacity.
2.	A person is not to be treated as unable to make a decision unless all practicable steps to help the person to do so have been taken without success.
3.	A person is not to be treated as unable to make a decision merely because the person makes an unwise decision.
4.	An act done, or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in the person's best interests.
5.	Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Table 1. The five statutory principles of MCA (section 3)

The MCA also provides five major instruments: (1) The mental capacity test; (2) the principle of best interests (section 6); (3) the Lasting Power of Attorney; (4) the establishment of Office of the Public Guardian; and (5) the deputyship.

These instruments govern an adult's use of his/her decision-making capacity on his/her personal wellbeing and property/affairs, before and after losing his/her mental capacity. The impact of the MCA is, therefore, widespread and immense.

The doctor's role in the certification of donor's mental capacity to create an LPA is essential. The doctor's certification of the person lacking mental capacity is necessary for the activation of LPA and for the support of application of the court-appointed deputy. In addition, since family physicians are crucial in continuity of care, the doctor's observation of any potential abuse of the donee's or deputy's power will be helpful in protecting P.

MCA CODE OF PRACTICE

The current Code of Practice is the third edition issued in 2016. A full copy can be downloaded in the OPG website (<https://www.msf.gov.sg/opg/Pages/The-Code-of-Practice.aspx>). It covers the application of the aforementioned statutory principles and the five major tools, and contains guidance on handling and reporting any potential abuse of the LPA and deputy. It is written in layman terms to explain the legally drafted Mental Capacity Act. Family physicians

are strongly encouraged to read this useful Code of Practice and keep a copy in their clinic for easy reference.

TESTS FOR MENTAL CAPACITY

Mental capacity tests comprise a clinical component and a functional component. They are stated in the MCA section 4(1) and 5(1) respectively, although it does not state which step should come first. However, the Code of Practice (4.5 and 4.6, pages 15-16) advises that the tests follow the sequence of: (1) Is the person suffering from an impairment of, or disturbance in the functioning of the mind or brain? (2) If yes, does the impairment or disturbance cause the person to be unable to make a decision when he needs to? This approach – where the clinical component is the first step – helps avoid incorrectly diagnosing people who merely make unusual or unwise decisions. It is mentioned in an English case in the Court of Protection in London in 2013 (*A Local Authority v TZ* [2013] EWCOP 2322).⁴

Section 4.11 of the Code of Practice also reminds us that this two-stage test for mental capacity is solely for the purposes of the MCA. There are other specific tests of capacity in other areas: making a will, entering into a contract, making a gift, and starting a litigation.

LASTING POWER OF ATTORNEY

The LPA has been increasing in popularity both within the medical profession and among the public. As of August 2020, there were 93,398 registered LPAs.⁵ Many doctors have registered as an LPA certifier and are familiar with the two areas of power for the donee: personal welfare and property & affair.

Apart from the mental capacity test during the certification of LPA, it is important to know the protections for donors from potential abuse of the donee's power. With the government encouraging people to make a LPA, there will be more registered donees, which would increase the likelihood of issues arising whenever the donees exercise their powers.

PROTECTION AND RESTRAINT

The power of a valid donee is not infinite. Various sections in MCA and Code of Practice indicate the limitations of his/her power.

When the Donee Makes Decisions on P's Behalf

- Use of donee's power

The donee may only make decisions under LPA for the donor if the donor lacks the mental capacity to do so (MCA §13, COP 8.12.3a). This requires a report from a doctor certifying the donor's lack of mental capacity. There is a simple format from the OPG website (<https://www.msf.gov>).

sg/opg/Pages/Forms.aspx Medical Report Template for LPA Transactions).

- Use of restraint

The donee cannot restrain P unless it is to prevent harm to P; the restraint is proportionate to the likelihood and seriousness of harm (MCA §13, COP 9.11.2b).

- Medical treatment

The donee may make decisions for P in giving or refusing consent to the carrying out or continuation of a treatment by a person providing healthcare for P. This includes clinical trials on P. The donee may not make any decision with respect to the carrying out or continuation of life-sustaining treatment on P, or to other treatments the healthcare provider believes is necessary to prevent a serious deterioration in P's condition (MCA §13(8), COP 1.6, 8.6.2).

- Property and affairs

The donee may not execute a will for P (MCA §13 (9), COP 8.6.3a). The donee may make decisions on P's CPF on P's behalf (MCA §13(9), COP 8.6.3a). The donee may not dispose of P's property as gifts unless it is expressed in the LPA (MCA §14, COP 8.6.3b).

The Donee's Personal Issues and the Powers of the Court with Regards to LPA

- Bankrupt donee

An undischarged bankrupt cannot be a donee (MCA §12(2), COP 10.5.3). P can revoke the LPA and terminate a bankrupt donee's appointment at any time, but the donee's bankruptcy (after creating the LPA) does not terminate his appointment in relation to P's personal welfare. Also, dissolution or annulment of a marriage (between the donor and donee) does not terminate the appointment of the donee (MCA §15, COP 8.64).

- Powers of the Court in relation to validity of LPA

The Court can order LPAs to not be registered or revoke the instrument if: (1) fraud or undue pressure was used in creating the LPA; (2) the donee of an LPA is convicted of an offence of criminal misappropriation, criminal breach of trust, cheating, theft, fraud, and dishonesty; (3) the donee engages in conduct that contravenes the donee's authority or that is not in P's best interests; and (4) if the registration of the donee as a professional deputy is cancelled (MCA §17(3) (4), COP 9.2).

- Powers of court in relation to operation of LPA

The Court may determine any question as to the meaning or effect of LPA and give directions with respect to decisions. The Court can give consent for P and give direction in relation to P's account, possession, expenses, and liability. (MCA §18, COP 9.2)

COURT-APPOINTED DEPUTY

Apart from the LPA, another important provision in the MCA is the court-appointed deputy. For people who have no relevant LPAs and require someone to make decisions regarding their future matters, the Court may appoint a deputy for this person (COP 9.5).

The deputy should act in the best interests of P and should not act beyond the scope and direction given by the Court. The deputy is answerable to the Court and the OPG will aid the Court in supervising the deputies in carrying out their duty. When applying the duty of care, deputies should not take advantage of their position to benefit themselves or pass on their authority to someone else. The deputies should act in good faith, respect confidentiality, and follow any directions from the Court. With regards to accounts, the deputy should keep the money and property of P separate from their own (COP 9.8).

Similar to an LPA donee, there are restrictions on the deputy's scope of duty. Generally, if the deputy has a reasonable belief that the person has mental capacity, the deputy should not make decisions for the person. Specifically, there are various restrictions placed upon deputies with regards to managing P's property, insurance, CPF, advanced medical directives, and decisions on healthcare treatment.

Historically, under the Mental Disorders and Treatment Act (which has since been repealed), a committee of the person or estate could be appointed by the Court to make certain decisions on behalf of a person suffering from a mental disorder. After the MCA came into force, the persons serving on existing committees will be considered deputies appointed by the Court. No new committees will be appointed; instead, deputies will be appointed for persons who lack capacity (COP 9.12).

Court-appointed deputies can be applied to the Family Justice Court Singapore via the Integrated Family Application Management System (iFAMS) portal. The doctor's role is to submit a medical report about P's lack of mental capacity. Currently, this can be done by filling up Form 224⁶ (<https://www.judiciary.gov.sg/forms/CourtFormsTopics/deputyship>).

ABUSE

Anyone who knows, suspects, or believes that a person who lacks capacity and needs protection may report this to the Public Guardian and the appropriate bodies. Individuals concerned about how a donee or deputy is carrying out his duties should contact the OPG. Healthcare workers who inform the OPG about their suspicions that a person who lacks capacity needs care or protection will not be breaching their professional code of ethics or standard of professional code. The person who reports the suspected ill-treatment to the OPG will not be identified during the court proceedings (COP 10.7).

THE OFFICE OF THE PUBLIC GUARDIAN

One of the important functions of the MCA is its provision for the appointment of a Public Guardian and the formation of the Office of the Public Guardian (OPG). The key functions of the Public Guardian are setting up, maintaining, and supervising the functioning of the LPA and deputies. The OPG also receives reports from the donees and deputies, deals with complaints, investigates any alleged violation(s) of any provision in MCA, and reports to the Court on matters relating to proceedings under the MCA (COP 10.5).

At time of writing, the OPG is in the process of switching the application of LPA to an electronic platform. The donor and donee(s) fill up and sign the electronic document before they see the certifier, who will sign the document via SingPass after the donor passes the mental capacity assessment. This will minimise the time and potential logistic errors (e.g., mailing) in the application.

CONCLUSION

The instruments and provisions in the MCA have great influence on a person who lacks mental capacity. Since dementia is more common among the elderly, the donor in the LPA is usually the elderly parent and the donee(s) are the children. Therefore, the question of who the donee(s) are may be complicated if there are intense family dynamics.

Family physicians have the privilege of caring for numerous members of the same family. This may help identify any undue influence on the donor. The tendency is for family members to initiate the LPA application when the elderly display the slightest signs of declining memory. In such cases of potential undue influence on the elderly or their borderline mental capacity, specialist referral would be appropriate for the LPA application. If the elderly does not have the capacity to appoint a donee, a court-appointed deputy application would then be necessary.

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LEARNING POINTS

- **A general practitioner must be accredited by the Public Guardian before certifying an LPA, but he**
The five statutory principles are crucial in the care of the person lacking mental capacity.
- **In 2016, four major areas were amended in the MCA: professional donees and deputies services, better protection from abuse by donees or deputies, use of LPA by donees to transact with third parties, and improved operation of OPG.**
- **Mental capacity tests consist of the clinical and functional components.**
- **Protections from the abuse of the donee's or deputy's power are given in detail in the Code of Practice. The OPG governs the use or abuse of power by the donee or deputy.**