

UNIT NO. 2

THE MENTAL CAPACITY ACT (2008): LEGAL IMPLICATIONS

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ABSTRACT

The Code of Practice provides that an accredited GP, and also mental health specialists, can conduct formal assessments of mental capacity. The accredited GP must acquaint himself with the prescribed formalities (completion of the prescribed Mental Capacity Assessment Form) when he conducts the formal assessment. If his assessment of mental capacity is inconclusive, the accredited GP should decline to make the certification in the Mental Capacity Assessment Form or indicate his decision accordingly in the Form. The MCA provides protection for a healthcare worker who notifies the Public Guardian of a person who the healthcare worker knows or has reason to suspect lacks capacity and is in need of care or protection. In relation to the matters of the formalities and validity of a Lasting Power of Attorney, one of the formalities is found in paragraph 2(I)(e) of the First Schedule of the MCA, which provides that the Lasting Power of Attorney must include: a certificate by a person of a prescribed description that, in his opinion, at the time when the donor executes the instrument — (i) the donor understands the purpose of the instrument and the scope of the authority conferred under it; (ii) no fraud or undue pressure is being used to induce the donor to create a lasting power of attorney; and (iii) there is nothing else which would prevent a lasting power of attorney from being created by the instrument. If a Court finds that undue pressure was used to induce a donor to execute a Lasting Power of Attorney, the Court can direct that the Lasting Power of Attorney should not be registered or order that it be revoked.

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INTRODUCTION

In the Mental Capacity Act, an accredited General Practitioner may be called upon to be a certificate provider, a role which has several legal implications which he must be aware of. These are dealt with in this paper.

The LEGAL IMPLICATIONS

A. A General Practitioner's role as a certificate provider under the Mental Capacity Act

A General Practitioner who has gone through the requisite

training and passed the tests jointly organised by the Ministry of Community Development, Youth and Sports and the College of Family Physicians can be on the panel of accredited GPs who are entitled under the Mental Capacity Act (MCA) to make formal mental capacity assessments.

Under the MCA, the Minister of Community Development, Youth and Sports may issue one or more Codes of Practice "for the guidance of persons assessing whether a person has capacity in relation to any matter" (see Section 41(1)(a) of the MCA).

Although the Code of Practice is not legislation or subsidiary legislation, and thus does not have the force of law, it is nevertheless stated in Section 41(5)(c) and (d) of the MCA that "It is the duty of a person to have regard to any relevant code if he is acting in relation to a person who lacks capacity and is doing so ... in a professional capacity or for remuneration".

The Code of Practice, currently in draft form (latest draft dated 1 September 2009), provides that an accredited GP, and also mental health specialists, can conduct formal assessments of mental capacity. Certain formalities have to be complied with for the conduct of such formal assessments.

Therefore, the accredited GP must acquaint himself with the prescribed formalities (completion of the prescribed Mental Capacity Assessment Form) when he conducts the formal assessment.

B. Issuance of certificate of mental incapacity by an accredited GP for purposes of third party transactions

The MCA provides for the creation of a new type of power of attorney known as a Lasting Power of Attorney. A Lasting Power of Attorney is a legal instrument (document) by which a person (the donor) confers authority on one or more other persons (the donee or donees) to:

make decisions about all or any of the following:

- (a) *[the donor's] personal welfare or specified matters concerning [the donor's] personal welfare;*
- (b) *[the donor's] property and affairs or specified matters concerning [the donor's] property and affairs, when [the donor] no longer has capacity to make such decisions.*

(Section 11(1) of the MCA)

A Lasting Power of Attorney can only be created when the donor has capacity to make such an instrument. However, the donee can only exercise the authority conferred on him when the donor no longer has the mental capacity to make the decisions relating to the matters specified in the Lasting Power of Attorney.

Some situations when an accredited GP might be called upon to conduct a formal assessment are aptly illustrated in the Code of Practice, as follows:

4.8.6 *A professional, such as a lawyer, or the donee of an LPA may seek a formal assessment where they have doubts about the person's capacity and the decision the person has to make is an important one. Examples of such decisions are:*

- moving house;
- emigrating to another country;
- selling assets; or
- transferring assets to another individual or organization.

4.8.7 *An individual or an organisation such as a bank, that deals with a donee of an LPA on a matter relating to the property of the donor, may require the donee to produce a certificate from an registered doctor stating that the donor's lack of capacity relating to the matter is likely to be permanent (section 13(10) Mental Capacity Act). To obtain this certificate, the donee must first get the donor's capacity formally assessed. If the donee fails to produce the certificate, the individual or organization may refuse to accept the donee's authority to act for the donor.*

Thus, when a Lasting Power of Attorney has conferred authority to a donee to sell the property of the donor, the lawyers acting for the parties in the transaction or the intended purchaser might want to verify whether the donee has the proper authority to sell the property. The lawyers and intended purchaser might then want to see the certification of mental incapacity. A similar situation might arise in other types of third party transactions, for example, where the donee seeks to rent out the donor's property or seeks to dispose of or purchase assets on behalf of the donor.

C. Legal advice for GPs with regards the assessment of mental capacity

In performing a formal assessment of mental capacity and making his certification, an accredited GP must bear in mind that he has to take reasonable care in carrying out this task. He should approach the task in the same manner as he would in making a diagnosis. Of course he must also ensure that the prescribed formalities in the Code of Practice are complied with. These include:

- ensuring that the Part A of the Mental Capacity Assessment Form must be completed by the persons requesting the assessment;
- reading the completed Part A in order to understand the reasons why the assessment is sought;
- completing Part B of the Mental Capacity Assessment Form.

The accredited GP ought not to be related in any way to the person to be assessed or have any interest (financial or otherwise) in any matter concerning the person to be assessed.

He should also bear in mind what is stated in Section 4(3) of the MCA, which provides:

(3) *A lack of capacity cannot be established merely by reference to —*

- (a) *a person's age or appearance; or*
- (b) *a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.*

If his assessment of mental capacity is inconclusive, the accredited GP should decline to make the certification in the Mental Capacity Assessment Form or indicate his decision accordingly in the Form (although we have to say that the present draft Form does not provide any space for an inconclusive assessment).

D. Whistle blower protection under the Mental Capacity Act for healthcare workers

Generally, a healthcare worker owes a duty of confidentiality to his patient. For certain types of healthcare workers, this duty is both a legal and an ethical one.

The MCA provides protection for a healthcare worker who notifies the Public Guardian of a person who the healthcare worker knows or has reason to suspect lacks capacity and is in need of care or protection. If the person concerned is a patient of the healthcare worker, a notification made under such circumstances would not be regarded as a breach by the healthcare worker of his duty of confidentiality to his patient. Furthermore, if the healthcare worker acted in good faith in making the notification, he would not incur any civil or criminal liability in respect of the notification.

For example, if a doctor, acting in good faith, notifies the Public Guardian that one of his patients lacks capacity and is in need of care or protection, the doctor would not be legally liable for defaming the patient even if it should be subsequently established that the patient was in fact either not lacking capacity or did not need care or protection.

The statutory protection is found in Section 43 of the MCA, which provides as follows:

Information relating to persons who lack capacity

43. — (1) *Any person who knows or has reason to suspect that a person who lacks capacity is in need of care or protection may make a notification to the Public Guardian of the facts and circumstances on which his knowledge or suspicion is based.*

(2) *Any health care worker who makes a notification under subsection (1) —*

(a) *shall not, by virtue of doing so, be held in any proceedings before any court or tribunal or in any other respect to have*

breached any code of professional etiquette or ethics, or to have departed from any accepted form of professional conduct; and

(b) insofar as he has acted in good faith, shall incur no civil or criminal liability in respect of the notification or the provision of any information contained in the notification.

(3) In subsection (2), “health care worker” means any registered medical practitioner, dentist registered under the Dental Registration Act (Cap. 76), pharmacist registered under the Pharmacists Registration Act 2007 (Act 48 of 2007), therapist, psychologist, social worker, counsellor, nurse, attendant or other person providing health care services.

(4) Any person appearing as a witness in any proceedings in any court or tribunal or before a person authorised by law to hear evidence shall not be compelled —

(a) to disclose the identity of any person who has made a notification under subsection (1), or any information likely to lead to the disclosure of the identity of such a person; or

(b) to produce any report or document which identifies, or is likely to identify, any person who has made a notification under subsection (1).

(5) In this section, “court” means any court of competent jurisdiction.

E. Undue pressure

The phrase “undue pressure” appears in the MCA in relation to the matters of the formalities and validity of a Lasting Power of Attorney. The phrase is not expressly defined in the MCA. Certainly it does not carry an identical meaning as “undue influence”. (Undue influence is a legal doctrine which can be used to invalidate a transaction or an instrument (for example, a will) where one party, in a position of power or confidence over another, had induced the latter, by overcoming his free will, into

entering into the transaction or executing the instrument.)

We think that the ambit of undue pressure is wider than that of undue influence. Whether there is undue pressure would be dependent on the facts and circumstances of each case, and it would not be useful here to prescribe categories of undue pressure.

In the MCA, there are certain formalities required to be observed in order to make a Lasting Power of Attorney. One of the formalities is found in paragraph 2(1)(e) of the First Schedule of the MCA, which provides that the Lasting Power of Attorney must include:

a certificate by a person of a prescribed description that, in his opinion, at the time when the donor executes the instrument —

(i) the donor understands the purpose of the instrument and the scope of the authority conferred under it;

(ii) no fraud or undue pressure is being used to induce the donor to create a lasting power of attorney; and

(iii) there is nothing else which would prevent a lasting power of attorney from being created by the instrument.

(emphasise ours)

As regards validity, Section 17 of the MCA provides that if a Court finds that undue pressure was used to induce a donor to execute a Lasting Power of Attorney, the Court can direct that the Lasting Power of Attorney should not be registered or order that it be revoked.

REFERENCE

Mental Capacity Act, 2008 URL: http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_legdisp.pl?actno=2008-ACT-22-N&doctitle=MENTAL%20CAPACITY%20ACT%202008%0A&date=latest&method=part&sl=1

LEARNING POINTS

- **The Code of Practice provides that an accredited GP, and also mental health specialists, can conduct formal assessments of mental capacity.**
- **The accredited GP must acquaint himself with the prescribed formalities (completion of the prescribed Mental Capacity Assessment Form) when he conducts the formal assessment.**
- **If his assessment of mental capacity is inconclusive, the accredited GP should decline to make the certification in the Mental Capacity Assessment Form or indicate his decision accordingly in the Form.**
- **The MCA provides protection for a healthcare worker who notifies the Public Guardian of a person who the healthcare worker knows or has reason to suspect lacks capacity and is in need of care or protection.**
- **If a Court finds that undue pressure was used to induce a donor to execute a Lasting Power of Attorney, the Court can direct that the Lasting Power of Attorney should not be registered or order that it be revoked.**