

Royal College of Psychiatrists Consultation Response



DATE: 16 August 2011

RESPONSE OF: THE ROYAL COLLEGE OF PSYCHIATRISTS

RESPONSE TO: Incapacitated person – a modern definition

The Royal College of Psychiatrists is the leading medical authority on mental health in the United Kingdom and is the professional and educational organisation for doctors specialising in psychiatry.

We are pleased to respond to this consultation. This consultation was prepared by Dr Julie Chalmers, the Mental Health Law Lead at the College.

Contributions were also given from the following:

- *The Social Care Institute for Excellence (SCIE)* is an independent charity that improves care services for adults, families and children by sharing knowledge about what works, and translating research into practical guides and learning materials.
- *Rethink*, the leading national mental health membership charity, works to help everyone affected by severe mental illness recover a better quality of life. We help over 48,000 people each year through our services and support groups and by providing information on mental health problems.

This consultation was approved by: Dr Ola Junaid-Associate Registrar

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Response to 'Incapacitated person – a modern definition'

We fully support HMRC in the view that the current definition is inappropriate and welcome the opportunity to comment.

It is the view of The Royal College of Psychiatrists that it is essential that the statutory wording be brought in line with current psychiatric and legal practice with regards to the definition of incapacity.

Capacity is a complex construct which refers to the presence of a particular set of “functional abilities” that a person needs to utilise in order to make a specific decision. The fact that a person belongs to a particular diagnostic group, for example, has a mental illness or has a learning disability, does not invariably mean they will lack capacity to make a specific decision or to manage their tax affairs.

1. A new definition is essential:

1.1 To avoid discrimination that may arise as the result of the use of archaic and offensive language.

1.2 In order that HMRC adopt a functional rather than status (or diagnosis based) test of capacity when considering the management of tax affairs thus bringing the approach in line with a modern understanding of the nature of capacity.

2. Mental Capacity legislation:

It is suggested that the definitions to be used to identify a person who lacks mental capacity to meet his/her obligations under tax law, should be the definitions in the mental capacity legislation prevailing in each specific jurisdiction: for England and Wales, the Mental

Capacity Act (MCA) 2005; in Scotland, the Adults with Incapacity (Scotland) Act 2000 (referred to below as the relevant legislation); in Northern Ireland, until the awaited legislation comes into effect, it is suggested that the England and Wales legislation could apply.

2.1 The MCA / Adults with Incapacity (Scotland) Act 2000 provides a comprehensive framework for making decisions and acting on behalf of those who lack capacity. We can identify no compelling reasons why this approach should not be applied when considering tax affairs and indeed the relevant legislation specifically includes the management of financial affairs.

2.2 Applying the MCA / Adults with Incapacity (Scotland) Act 2000 definition would bring the functions of HMRC in line with other financial decision-making on behalf of a person who lacks the mental capacity to act for him/herself at the time that action should be taken. See "*Banking on Good decisions*" Mental Health Foundation 2008.

3. Rights and responsibilities for tax affairs should be transferred in accordance with the Mental Capacity Act:

3.1 The relevant legislation provides a statutory framework that clearly outlines the process of decision making on behalf of the incapacitated person. The MCA contains mechanisms whereby, whilst capacity is retained, the person may appoint an LPA - Lasting Power of Attorney (Property and Affairs). If the person lacks capacity at the material time then the Court of Protection has the power to appoint a deputy to act on their behalf.

'If a donor does not restrict decisions the attorney can make, the attorney will be able to decide on any or all of the person's property and financial affairs. This might include...dealing with the donor's tax affairs...' (Code of Practice, 7.36).

3.2 There are clear protections for the incapacitated person. Protection is afforded to the person lacking capacity by a range of duties laid on the attorney or deputy. These include (but are not limited to) fiduciary duty, duty of care, duty of good faith, duty to comply with the directions of the court of protection, duty to keep accounts and duty to keep the donor's money and property separate. These are all part of an extensive series of measures which protect the rights of a person lacking capacity to manage his/her own money. It would appear perverse to discount these protections, and might be open to a challenge of discrimination under the Equality Act 2010.

It is important to note that an LPA or Deputy has duties as described above (and in further detail in the MCA Code of Practice) but is not liable in the same way as those who have taken on a formal transfer of obligations under the current tax arrangements.

3.3 Concern is expressed in 4.2.3 that the use of the MCA definition (and perhaps by extension the mechanisms of the MCA such as Deputyship or lasting powers of attorney) could 'become administratively burdensome for both taxpayer and HMRC.'

The potential impact on administrative time is not, in our opinion, sufficient reason not to use the relevant legislation. An important principle underpinning the legislation is the presumption in favour of capacity. HMRC would only need to consider the issue of capacity if there was evidence to rebut the presumption in favour of capacity. Where there is fluctuating capacity the "reasonable excuse" route could potentially be followed in the first instance. If this became a recurrent issue then the person could be encouraged to make appropriate provisions for periods of incapacity. In the case of permanent incapacity this would be a one off determination and again steps could be taken to appoint appropriate people to act on the incapacitated persons behalf if this had not been done before capacity had been lost. It has not been

established that, with robust mechanisms in place, adopting this approach would be administratively more burdensome than current arrangements.

See appendix for a case example of fluctuating capacity and LPA (Property and Affairs) and an example of the LPA where capacity will not be regained.

3.4 Statement of Practice A13, which only refers to physical disability rendering a person unable physically to sign, and thereby enabling another person to sign on behalf of the person, does not address the issues relating to the person lacking mental capacity to appoint somebody to do this. SoP A13 fails to protect the rights of this group of people. The MCA however does do so.

4. Retaining the concept of "reasonable excuse" is also supported

This allows flexibility to respond to situations where a person with mental health difficulties has been unable to fill in their self assessment form as a result of a period of illness. Such difficulties may have given rise to a period of incapacity or, if falling short of this may nevertheless impair concentration or motivation so that there have been problems in meeting self assessment deadlines

Appendix

An example of fluctuating capacity:

Martin aged 49 retired early from his job as a senior fireman due to physical problems sustained as a result of an accident at work. He then developed a severe depressive disorder which required in-patient treatment around the time that he was required to submit his Income Tax Self Assessment. Once improved and discharged from hospital he became aware that this was now overdue and contacted his local tax office outlining the reasons for the delay in submission. The tax office considered that, on this occasion, he had a reasonable excuse.

He then went on to have a further episode of illness 9 months later again requiring in-patient treatment. When unwell he believed that he was bankrupt and would be put in prison for fraud. Again he was late in submitting his ITSA. He again approached the tax office once improved but was anxious that he may have to pay a penalty as this was now the second occasion he had failed to submit his form before the deadline.

He discussed his concern about managing his financial affairs should he become unwell again with his family and consultant psychiatrist. As his doctor thought that there was a significant risk of recurrence of his depressive disorder Martin decided to make a lasting power of attorney in favour of his son.

The following year he was well and was able to complete his ITSA as usual.

He again suffered a further episode of severe and protracted depression with abnormal beliefs about his lack of finances. When the self assessment forms were required, on this occasion, his professional advisors and family thought he lacked the capacity to complete them and his son then registered the LPA,

and thereby gained legal authority to manage all his father's financial affairs, including taxation matters. After a change in treatment his improvement was sustained and he remained well for two years. During this time he was once again able to manage his own affairs.

An example of a condition where capacity will not be regained:

Jane is a retired midwife. When diagnosed with dementia, she made lasting powers of attorney for both personal welfare and property/affairs, in favour of her daughter Kate. Whilst Jane retained the mental capacity to deal with her tax affairs, she did so. However the time came when she could no longer recall the need to complete tax returns, nor any of the information required for their completion. Her daughter then registered the LPA, and thereby gained legal authority to manage all her mother's financial affairs which she did for the remaining years of her mother's life.

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