

BiHR's Unofficial Guide to the Select Committee on the Mental Capacity Act 2005: Call for Evidence

August 2013

ABOUT US: Founded over 40 years ago, the British Institute of Human Rights (BiHR) is a national independent human rights charity that is committed to bringing rights to life in the UK. We support civil society organisations and the public sector to know about human rights, put them into practice in everyday life beyond the courtrooms, translating the law into a force for positive change. We marshal this evidence of human rights in action in the UK to inform national law and policy change. Through this work, we aim to realise the potential of human rights to empower people, and to provide a safety net for us all when our rights are compromised.

About this Guide

This is a guide to the Call for Evidence issued by the Select Committee on the Mental Capacity Act 2005. It has been produced by the British Institute of Human Rights. We are **not** part of the Government or the Committee. This guide is **unofficial**. We have produced it to try and help others make sense of the Committee's Call for Evidence. We have reproduced the official questions the Committee is asking. We have tried to explain what we think the questions mean and provide information we think you might need to think about the issues. These are only suggestions and they don't cover everything. There may be other information you want to use to help you. Please remember that the information in this document is intended to help you submit evidence to the Committee and a lot of it is our interpretation of what we think the Committee is asking.

How to use this Guide

This guide starts by providing some background information about the Committee and why it was established. The Guide then contains information about how to respond and why it is important to have your voice heard in the Committee's inquiry.

We have included a section containing a short explanation of the Mental Capacity Act and how the Act relates to our human rights law (the Human Rights Act 1998).

We then set out each of the questions the Committee has asked in its Call for Evidence. We have explained what we think the questions mean, and suggested some points to think about to help you decide what you would like to include in your evidence. These are only suggested points and you may have other things you would like to tell the Committee.

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About the Committee

Parliament has established a Select Committee on the Mental Capacity Act (MCA) 2005. A Select Committee is responsible for checking and reporting on a particular issue. The Committee is made up of members of the House of Lords. The Committee has been appointed to consider and report on the effectiveness of the MCA. The **Committee will look at all aspects of the MCA to see if it is working as parliament intended when it passed the law in 2005.**

The Committee will be looking at:

- Whether the Government's implementation programme was effective in embedding the guiding principles of the MCA in every day practice;
- Whether there has been a noticeable change in the culture of care;
- How well the MCA is understood by those who are affected by it;
- Whether the safeguards contained in the MCA are sufficient: (a) are people able effectively to challenge decisions made under the MCA? (b) Is the Court of Protection accessible to those affected?

To conduct a thorough review of the effectiveness of the MCA the Committee has issued a Call for Evidence. The Committee are keen to hear from the general public, third sector organisations, the private and public sectors, community groups, politicians, and government departments. Anybody can submit evidence to the Committee, **you do not have to be affiliated to an organisation.** The Committee are **particularly keen to hear from people who have "first hand" experience of the MCA.** In practice this may mean people who have been directly affected by the MCA or the relatives, friends, or carers of someone who has been directly affected by the MCA. It may also include individuals who have experience advocating for someone who has been directly affected by the MCA, either professionally or informally, and professionals working in the health and social care sector who have experience of applying the MCA in frontline practice.

It is important to note that whilst the Committee are keen to hear about individual experiences, the Committee is investigating the Mental Capacity Act in general and will not be investigating individual cases.

In addition to receiving written evidence the Committee will hear oral evidence from relevant organisations and individuals. Once the Committee has gathered this evidence they will draft a report containing recommendations, the deadline for producing this report is the 28 February 2014.

Why has the Committee been established?

There are concerns the parts of the MCA that are supposed to ensure safe and fair decisions are made (known as the procedural safeguards) **may be inadequate to satisfy the requirements of the Human Rights Act 1998.** In practice this means there are worries that decisions by professionals applying the MCA in services are not always safe and fair, which **can mean the human rights of people who lack capacity are not being respected.** There

have also been a number of **high profile cases in recent years involving adults with learning disabilities** who have been subjected to extreme abuse and neglect, most notably in Winterbourne View care home, that have **sparked concerns that the safeguards in place to protect adults who lack capacity are failing**. Recent reports by the charity Mencap, and the regulatory body the Care Quality Commission have also contributed to concerns that the MCA is not being properly implemented and applied in frontline practice.

Why you should respond

The Committee's call for evidence is a unique opportunity to feed in your views to an influential inquiry. At BIHR we know from our work in the field of health and social care that there is a lot of anecdotal evidence about problems with the implementation of the MCA. Sharing your personal or organisational experiences of the MCA can help the Committee build up a 'big picture' of how the law is being interpreted and applied. Once the Committee has collected this evidence they will draft a report containing a set of recommendations for Government. This is a real opportunity to push for better implementation and understanding of the MCA, and if necessary changes to the law.

Important: Individuals please read this!

The Call for Evidence includes questions about the **Court of Protection**. People are encouraged to **share their experiences of being involved in cases in the Court of Protection** as part of their evidence. However sharing information about cases in the Court of Protection outside of parliament (for example if you decide to publish evidence on a website) might be considered a **contempt of court which is punishable by law**. An easy way to think about this is **you are protected when telling this information to the Committee, but you are not protected if you share this information with anyone else**.

How to submit your evidence

The Committee have issued a set of questions in their Call for Evidence. **You can answer as many of the questions you feel are relevant to you, you do not have to answer them all**. To help you interpret the questions, in this Guide BIHR has set out each of the questions, provided some guidance on what we think the questions mean, and suggested some points to think about to help you decide what you want to tell the Committee. These are **only suggestions** that don't cover everything and there may be other information you want to use to help you. Please remember **this is an unofficial guide** and it is therefore our interpretation of what we think the Committee is asking.

Top tips for drafting your evidence

- Look at the **"Things to think about" box** on each question. We have tried to include specific points to think about, definitions, and examples to get you thinking about each question, but they are only suggestions. There may be other things that are particularly important to you which you want to tell the Committee

- **Examples are always really useful** when trying to explain something and to show your 'evidence' for why you think something. Think about your daily life experiences of the MCA either as an individual or as an organisation and how this experience informs your views about the MCA. You may have experience of using the MCA as a professional, you may be an organisation that supports people who have been subject to the MCA, or the friend or relative of a person who has had their capacity questioned. Whatever your experience, it's really helpful to think of examples, case studies or other 'evidence' to back up your position.
- If you are an organisation or network **what do your members think?** Can you use quotes? Could you email them to ask or maybe set up a survey-monkey or other online poll?

To send the Committee your evidence you must email it to holmentalcapacityco@parliament.uk or post it to Judith Brooke, Clerk, Committee on the Mental Capacity Act 2005, Committee Office, House of Lords, London SW1A 0PW. The deadline for written responses is 2 September 2013. If you think you may need extra time it is worth contacting the Committee Clerk to see if this is possible (but there are no guarantees!)

Five things BIHR will be telling the Committee

Making human rights explicit in the implementation of the MCA: The Human Rights Act underpins the MCA, however to ensure human rights are being respected and protected when applying the MCA, the Human Rights Act must be explicit in the implementation of the MCA. Adopting a human rights approach to the implementation of the MCA (for example in designing policies on the MCA, delivering training, and drafting information on the MCA for service users) would help ensure that people's human rights are being considered when the MCA is being applied in frontline practice.

Promoting the 5 core principles of the MCA across health and social care structures and beyond: the 5 core principles that underpin the MCA (see p.7) are key to understanding how to apply the MCA in practice. If these basic principles, which are based on key human rights principles, were 'common knowledge' across the NHS, in social care settings and other relevant systems and structures this would go a long way towards ensuring the MCA is correctly implemented and applied in frontline practice.

Investment in implementing the MCA: there are low levels of awareness of the MCA amongst professionals which is leading to the MCA being wrongly applied in frontline practice. There is also a lack of accessible information about the MCA available to people who are directly affected by the MCA (and their carers and families) which means they are unable to challenge bad practice when they encounter it. The Government must invest in training for frontline professionals, and provide accessible information and resources for individuals, carers and families as a first step towards ensuring the MCA is correctly implemented and applied.

Increasing access to the MCA safeguards: the MCA provides a number of important safeguards to ensure decisions that are made on behalf of a person who lacks capacity, or decisions that are made about a person's capacity, are made in a safe and correct way. BIHR is concerned that the low levels of referrals to IMCAs and the costs of making an application to the Court of Protection (coupled with the reductions in legal aid) means these safeguards are not working in practice. The Government must raise awareness of the IMCA service (and when to make a referral) amongst professionals across the field of health and social care, and make the Court of Protection more accessible by providing better information about the Court, reducing court fees, and increasing access to legal aid.

Monitoring and Regulation of the MCA by the Care Quality Commission: the Care Quality Commission (CQC) already monitors and reviews the use of the Deprivation of Liberty Safeguards (part of the MCA) and the Mental Health Act. Extending the powers of the CQC to include regulation of the use of the MCA would be an important step towards ensuring the MCA is correctly implemented and applied in practice.

The Mental Capacity Act in ten minutes!

This is a **brief overview** of the Mental Capacity Act (MCA) 2005. For more information see the [Mental Capacity Act Code of Practice](#), which provides a detailed explanation of the MCA and how it should be applied in practice. The charity Mind have also produced a helpful [legal guide to the MCA](#) which includes details of where you can go for further information and support.

It's about protecting human rights: The MCA was designed to protect individuals who cannot make decisions for themselves. The **MCA has strong roots in human rights**. A number of high profile human rights challenges to mental health law identified a lack of protection of the rights of people who lack capacity. In response to these challenges and campaigning by disability organisations and others, the Government recognised the need for further legal protection in this area and drafted the Mental Capacity Act.

Lord Falconer, who played an important role in drafting the MCA said it "will empower people to make decisions for themselves wherever possible, and protect people who lack capacity by providing a flexible framework that places individuals at the very heart of the decision-making process. It will ensure that they participate as much as possible in any decisions made on their behalf, and that these are made in their best interests."

The MCA applies to anyone whose mental capacity to make decisions is affected by (what the MCA refers to as) "**an impairment of, or a disturbance in the functioning of, the mind or brain.**" In some cases, a person's capacity may be permanently affected (e.g. if they have suffered a brain injury or have a certain form of dementia). But in others, the person's capacity might be affected for a temporary period (e.g. if they are confused or unconscious). The **MCA sets out provisions** for assessing capacity to make specific decisions, **procedures** for making decisions on behalf of people who lack mental capacity, and **safeguards**.

The MCA is based on five core principles:

Presumption of capacity: this recognises that everyone has the right to make their own decisions if they have the capacity to do so.

Maximising decision making capacity: people should be supported and empowered to be able to make their own decisions.

Right to make unwise decisions: people have the right to make decisions that others might think are unwise.

Best interests: any decision or action carried out on someone's behalf must be in their best interests.

Least restrictive option: any decision or action carried out on someone's behalf must be the least restrictive on a person's rights or freedoms (this is called **proportionality**).

These are human rights principles designed to ensure that any decisions about a person's capacity are made in a way that respects, protects and fulfils their human rights.

How capacity should be assessed: Capacity is our ability to make decisions about what happens to us, including decisions about our treatment and care. The **MCA is clear that an assessment of a person's capacity must be based on their ability to make a specific decision at the time it needs to be made**, not their ability to make decisions in general. This recognises that people may be able to make decisions about some things and not others, or their capacity to make a decision may change over time. The MCA states that a person is unable to make a decision if he or she is **unable to do one or more** of the following things:

- **Understand** the information relevant to the decision
- **Retain** the information for long enough to be able to make a decision
- Use or **weigh up** the information as part of the process of making the decision
- **Communicate** the decision by any possible method, such as talking, using sign language, squeezing someone's hand and so on.

How best interest decisions should be made: If someone loses capacity to make a decision, the MCA says that another person can make that decision for them, but that decision **must restrict their freedom as little as possible** and be in their **best interests**. A person making a decision in someone's best interests must:

- Consider all the relevant circumstances
- Consider whether and when the person will have capacity to make the decision in the future and whether to put off making the decision immediately
- Support the **person's participation** in acts done for him and decisions affecting him
- Consider the **person's expressed wishes and feelings, beliefs and values** and other factors that the person would be likely to consider
- Take into **account the views of carers, people with an interest in the person's welfare**, or those appointed to act for the person.

Independent Mental Capacity Advocates

The MCA provides for an Independent Mental Capacity Advocate (IMCA) service in England and Wales to provide **independent advocates to support and represent people who do not have the capacity to make a decision.**

An **IMCA must be appointed for a person lacking capacity who has no close family member or unpaid carer** to support them if decisions are being made about serious medical treatment or long term living arrangements. An IMCA may also be appointed in other circumstances, for example if a local authority is conducting a review of a person's accommodation.

NHS bodies or local authorities have a **duty to listen to an IMCA's views when making decisions that affect a person who lacks capacity.** The provision of IMCAs is one of the procedural safeguards provided by the MCA to ensure that decision making by professionals involving a person who lacks capacity is safe, fair and respectful of that persons rights.

Deprivation of Liberty Safeguards (DOLS)

The DOLS are **intended to offer additional safeguards for people who lack capacity to ensure they do not have their human rights to liberty restricted more than is absolutely necessary**, and that any restriction is in their best interests. In practice this is the purpose for which DOLS should be used. You can tell the Committee whether this is happening.

DOLS require that the **decision-maker must follow an authorisation process before the person can be lawfully deprived of their liberty.** There are various steps to the process but the central one is that the **"managing authority"** (e.g. the care home or a hospital that is looking after the person concerned) **must apply to a "supervisory body"** (usually the local authority) for authorisation to deprive that person of their liberty. Without this authorisation any deprivation of liberty will be unlawful. The DOLS were created because a legal case found the previous lack of safeguards in this situation was unlawful as it failed to people's right liberty (under the Human Rights Act). This case, involved an autistic man had been deprived of his liberty whilst receiving treatment at Bournemouth Hospital, however he was not formally detained ("sectioned"). There were no specific guidelines or safeguards for adults without capacity who were deprived of their liberty in hospitals and care homes whilst voluntary patients. The Court said the detention of the man had been **unlawful**, and identified a gap in mental health law. The DOLS were passed to fill this gap.

The Court of Protection

The Court of Protection was created by the MCA to **oversee actions taken using the MCA and to resolve any disputes that involve mental capacity matters.** It has the power to:

- Decide if a person has capacity to make a particular decision for themselves

- Make declarations, decisions or orders on financial or welfare matters that affect people who lack capacity to make such decisions
- Appoint deputies to make decisions for people lacking capacity to make those decisions (a deputy is a substitute decision maker, usually a friend or family member but sometimes someone independent)
- Decide whether a Lasting Power of Attorney or Enduring Power of Attorney is valid (an attorney is someone who has been appointed to make decisions on behalf of someone else)
- Remove deputies or attorneys who fail to carry out their duties.
- Decide if DOLS authorisations are lawful and resolve DOLS disputes

An individual who has had their capacity questioned, attorneys, deputies, family members, healthcare trusts, and local authorities can all apply to the Court of Protection. The person who lacks capacity to make the decision should be involved in proceedings about themselves.

The Office of the Public Guardian supervises the enforcement of decisions made by the Court of Protection. The Office of the Public Guardian supports attorneys and deputies to carry out their duties and **produces information and guidance for families, carers, healthcare professionals and lawyers.** The Office of the Public Guardian also has a **regulatory role, investigating reported concerns about attorneys and deputies** who may not be doing their job properly.

The Human Rights Act in five minutes!

The Human Rights Act (HRA) is one of the most important laws protecting our rights in the UK. This includes our rights to liberty and to mental well-being, and the ability to participate in decisions that affect us.

The HRA places legal duties on public authorities (including healthcare services, local authorities and social services) to respect, protect and fulfil people's human rights in their day-to-day business. This includes in the way they make decisions and exercise their powers and functions under different laws, such as the MCA. In some cases the HRA may also require positive action to protect rights, this includes protecting a person when they are known to be at risk and having the right procedures and systems in place to protect our rights.

The HRA is therefore an important tool for helping to decide how well or not the MCA is doing at protecting people's rights.

Key things to remember about the Human Rights Act:

1. Human rights are the basic rights and freedoms that belong to all people, including those with limited capacity. They cannot be taken away (but some can sometimes be restricted).

2. Most rights in the HRA can be restricted in certain circumstances. It is not enough to have a good motive for restricting rights, there are still tests which need to decide if the restrictions are allowed under human rights law:
 - A public authority can restrict your rights if they have a legitimate aim, for example if they are concerned about your safety, or to protect the wider community from harm.
 - Any restriction on your rights must be proportionate. This means a public authority must have a legitimate aim, and the restriction on rights must be the least possible restriction in the circumstances. **This is especially important in deciding whether the right balance has been struck in respecting the rights of a person with limited capacity and protecting them from harm.**

Some of the most relevant rights include:

- the right to be free from inhuman and degrading treatment: this is an absolute right, and can never be restricted. This means proportionality is not an issue.
- the right to liberty: this is a limited right which means it can be restricted but only in strictly defined circumstances which are written into the right (e.g. to receive mental health treatment). Even then restrictions on liberty must be necessary and there must be safeguards in place, e.g. review processes.
- the right to respect for private and family life: this is an important right because it includes mental well-being and participation in decisions which affect you. It is a qualified right so it can be restricted, but such restrictions must be proportionate (see above).

For more information download your copy of BIHR's "Mental Health Advocacy and Human Rights: Your Guide" available at

<http://www.bihhr.org.uk/media/new-mental-health-advocacy-and-human-rights-your-guide>

Overview and context

The first three questions are very broad; they are an opportunity to make some general comments about the MCA and whether it has achieved its aims.

QUESTION 1: Has the MCA achieved its aims?

Q1. To what extent has the MCA 2005 achieved its aims?

WHAT WE THINK THIS QUESTION MEANS:

- Has the MCA achieved its aim of protecting individuals who cannot make decisions for themselves?

THINGS TO THINK ABOUT:

The MCA is a big piece of legislation with many different parts. Its overall aim is to protect individuals who cannot make decisions for themselves. It does this by providing:

- A framework for assessing whether people have the mental capacity to make decisions (how to assess a person's capacity)
- Procedures for making decisions on behalf of people who lack mental capacity (how to make a decision in a person's best interests)
- Safeguards to ensure decisions that are made on behalf of a person who lacks capacity, or decisions that are made about a person's capacity are made in a safe and correct way which respects their rights (e.g. providing a way of challenging a decision that has been made about a person's capacity).

Do you think the MCA does these things? And if so how well?

QUESTION 2: Changing the MCA

Q2. Which area of the Act, if any, require amendment; and how?

WHAT WE THINK THIS QUESTION MEANS:

- Are there parts of the MCA that are working?
- Are there parts of the MCA that are not working?
- If you could make changes to the MCA, what would these changes look like?

THINGS TO THINK ABOUT:

- Do the different parts of the MCA work in practice, and are they helping to ensure that people who lack capacity, and their rights, are protected?
- If they aren't working, why aren't they working and how would you change the Act to make it more effective?
- Has the MCA improved the situation for individuals lacking capacity or has it made decisions on their behalf more difficult to make?

- Are there areas of the MCA that could be made clearer or removed so that there will be greater understanding of what the MCA is trying to achieve?

QUESTION 3: MCA principles and definitions

Q3. At the core of the MCA are its principles and definitions of capacity and best interests. Are these appropriate?

WHAT WE THINK THIS QUESTION MEANS:

- The MCA is based on five core principles (see p.7) – are these the right principles?
- Key to understanding and applying the MCA are the definitions of capacity and best interests (see below for the definitions) – are these definitions appropriate? If they are not appropriate why are they not appropriate?
- Best interests is not defined in the MCA, instead the MCA provides a test for how to make a decision is someone's best interests. Does this work in practice?
- Do these principles and definitions work in practice? Are they well understood by the practitioners that apply them in frontline practice?

THINGS TO THINK ABOUT:

The MCA is based on five core principles:

- **Presumption of capacity:**
- **Maximising decision making capacity:**
- **Right to make unwise decisions:**
- **Best interests:**
- **Least restrictive option:**

For a fuller explanation of the five core principles see p.7

'Mental capacity' is the ability to make a decision. It includes the ability to make a decision that affects daily life – such as when to get up, what to wear or whether to go to the doctor when feeling ill – as well as more serious or significant decisions. It also refers to a person's ability to make a decision that may have legal consequences – for them or others. Examples include agreeing to have medical treatment, buying goods or making a will.

'Best interests' is not defined in the MCA. This is because so many different types of decisions and actions are covered by the Act, and so many different people and circumstances are affected by it, however some have argued this wide interpretation has led to problems when applying the MCA in practice. The MCA sets out a test for how to determine someone's best interests, for more information about this test see P.7.

- Has the MCA improved the situation for individuals lacking capacity or has it made decisions on their behalf more difficult to make?
- Are there areas of the MCA that could be made clearer or removed so that there will be greater understanding of what the Act protects?

Implementation

The next set of questions look at how well the MCA has been implemented in practice. Much of the criticism (and motivation for conducting an inquiry into the MCA) focuses on the MCA being a well-designed piece of legislation that hasn't been implemented properly. As a result the Committee will be interested to hear about your own personal experiences of how well the MCA has been implemented in practice.

QUESTION 4: Implementation of the principles of the MCA

Q4: To what extent have the five principles of the MCA been implemented in frontline practice? What evidence is available to assess this? Is there a satisfactory balance between enablement and protection?

WHAT WE THINK THIS QUESTION MEANS:

We think this question can be broken up into a few parts:

To what extent have the five principles of the MCA been implemented in frontline practice?

- See p.7 for a summary of the five principles of the MCA. Do you think these principles have been implemented in frontline practice?
- Are professionals who are responsible for applying the MCA in frontline practice (e.g. professionals who make decisions about a person's capacity, or support people who have been directly affected by the MCA) aware of these five principles and how they should be applied in frontline practice?

What evidence is available to assess this?

- Are you aware of any evidence to support your view of the above?
- For example, if you do not believe the five principles have been implemented very well in frontline practice, do you have any evidence to support this position?
- Do you think there are problems with monitoring the implementation of the MCA which means there is a lack of evidence? Do you have suggestions for how monitoring and evidence-gathering could be improved?
- Remember your own personal experiences count as evidence too!

Is there a satisfactory balance between enablement and protection?

- The question addresses the balance that needs to be struck between enablement and protection. This is about enabling people to make decisions themselves as far as possible, but also ensuring the right safeguards are in place when a person lacks capacity to make a decision.

THINGS TO THINK ABOUT:

When answering these questions think about your own personal experiences:

- Are you a professional with experience of trying to implement the MCA?
- Do you support people who lack capacity and have been subject to the MCA?

The five principles of the MCA should underpin all decisions that are made using the MCA. To help you think about how the five principles relate to everyday situations we've given an example of how they can be reflected in practice and where they are not:

- A social worker supports a woman with dementia to be involved in a decision about whether she should return home or move to a care home after a prolonged hospital stay OR
- A social worker fails to take the time to support a woman with dementia to be involved in the decision about where she will live and makes the decision for her.

The principles underpinning the MCA are all about **enabling** people to be able to make decisions, or be involved in decisions that are being made in their best interests. Extra support might be required to **enable** people to do this.

Thinking about your experience:

- Are the **protections** provided to people by the MCA adequate?
- Do you think the right balance is being struck or is there too much emphasis on one issue over the other. For example is there too much emphasis on protection rather than enablement?
- Are professionals (and others) assuming a lack of capacity which means people's rights are not being respected?
- Are professionals failing to intervene in incidences where an individual lacking capacity needs protection?
- What are your experiences about how the balancing exercise is carried out – are human rights referred to?

Remember: The Human Rights Act includes rights to participate in decisions about what happens to you (protected by the right to respect for private life, Article 8). This right can be restricted when there is a need to balance it against other legitimate reasons, such as protecting people from themselves or others. However, such restrictions need to be proportionate, i.e. the least restrictive option available.

QUESTION 5: The Government's implementation plan

Q5. How effective was the Government's implementation plan? What measures were taken to ensure that professionals and families of those who lack capacity know about and act in accordance with the provisions of the MCA? Has it led to sustainable change?

WHAT WE THINK THIS QUESTION MEANS:

There are a few parts to this question:

How effective was the Government's implementation plan?

- When the MCA was passed the Government launched a programme of work to implement the MCA into frontline practice.

- This work included producing the MCA Code of Practice, which offers detailed information and guidance for practitioners using the MCA.
- How effective do you think the Government’s implementation plan has been?

What measures were taken to ensure that professionals and families of those who lack capacity know about and act in accordance with the MCA?

- Are you aware of any action taken by the Government to ensure that professionals and families of those who lack capacity know about and act in line with the MCA?
- How did you find out about these and were they helpful?

Has it led to sustainable change?

- Has the Government’s implementation plan led to lasting positive changes to protect the rights of people who lack the capacity to make a decision for themselves?

THINGS TO THINK ABOUT:

These questions are about whether the Government has done enough to ensure the MCA was properly implemented.

There has been a fair amount of criticism of the MCA, with various people arguing that whilst MCA is generally a well thought out piece of legislation, problems are occurring because it is not being properly implemented in practice. This may relate to lack of awareness and understanding about the MCA.

- What is your experience?
- Are you aware of any plans by central Government (e.g. Department of Health) or local Government (e.g. social services, health services and local authorities) to implement the MCA? For example producing guidance, providing training for staff, producing leaflets and information for service users, families and carers.
- Have these efforts been effective at ensuring people know about and understand the MCA?
- Are these efforts on-going? For example do new staff receive training on the MCA, are resources regularly updated?

QUESTION 6: Professionals understanding and knowledge of the MCA

Q6. Is the Act widely known and understood by professionals required to implement it? How does this differ across different sectors, such as health, social care, banking and others?

WHAT WE THINK THIS QUESTION MEANS:

There are a few parts to this question:

Is the Act widely known and understood by professionals required to implement it?

- Do the professionals who are meant to implement the MCA have knowledge of the Act?

- Do those professionals understand the MCA and how it should be applied in frontline practice?

How does this differ across different sectors, such as health, social care, banking and others?

- Do professionals from different sectors have different knowledge and understanding of the MCA?
- Are their greater levels of awareness and understanding of the MCA in some sectors than others?

THINGS TO THINK ABOUT:

- These questions look at whether professionals who are supposed to know about the MCA have a good understanding of it, something which is required of them if they are using the MCA in frontline practice.
- If you are professional, have you been supported to understand the MCA? How effective was this? Do you have good examples you can share? Do you have suggestions for improvements?
- The Committee are also trying to find out whether there is a difference in knowledge and understanding between people who work in different sectors. What is your experience? Have you received different opinions regarding how the MCA should protect you or someone you know? Are you an advocate that has experience of interacting with professionals from a range of different sectors about issues relating to the MCA?

QUESTION 7: Carers understanding and knowledge of the MCA

Q7. Is the Act widely known and understood by those who are directly affected by it and by their non-professional carers? To what extent does the Act provide protection and reassurance for informal carers? Has the right balance been struck between protection of the carer and protection of the individual lacking capacity?

WHAT WE THINK THIS QUESTION MEANS:

There are a few parts to this question:

Is the Act widely known and understood by those who are directly affected by it and by their non-professional carers?

- Do you (or the person you care for) feel that you understand how the MCA protects your rights?
- Have you ever been in a situation where you (or the person you care for) have had your capacity questioned and you have been unclear about how the law protects you (how the MCA protects your rights in that situation)?
- Do you think there is enough accessible information about the MCA available for you (or the person you care for)?

To what extent does the Act provide protection and reassurance for informal carers?

- Are you aware of the rights you have as an informal carer under the MCA?

- Do you feel these rights provide adequate protection and reassurance for informal carers?
- Do you need stronger legal protection under the MCA? If so, what would this look like?

Has the right balance been struck between protection of the carer and protection of the individual lacking capacity?

- Does the MCA strike the right balance between protecting the needs and rights of carers, and the needs and rights of the individual lacking capacity?
- If you don't think the right balance has been struck, how should it change?

THINGS TO THINK ABOUT:

- These questions try to identify if people who are directly affected by the MCA, and their non-professional carers (unpaid carers) understand the MCA and how it applies to them.
- The Committee are also interested to know if people who are directly affected by the MCA and their non-professional carers feel the MCA provides them with protection and reassurance, and if the right balance has been struck between protecting the rights of individuals who are directly affected by the MCA, and the rights of their carers.
- What is your personal experience? Have professionals explained the MCA to you and what it means in your situation in a way that you understand? Has there been information on the MCA available to you in a format you understand?
- If you do know and understand the MCA do you think it offers you adequate protection? If not why not? Do you think it protects you and your carer in the right way?

QUESTION 8: A change in culture of care

Q8. Has the Act ushered in the expected, or any, change in the culture of care?

WHAT WE THINK THIS QUESTION MEANS:

- Has the MCA lead to any change in the way individuals lacking capacity are cared for?
- If there has been a change, what does this change look like? Do you think it was the change that was expected when the MCA was created?
- Do you think that individuals lacking capacity are more protected now than before the MCA was part of our law?

THINGS TO THINK ABOUT:

When constructing the MCA the aim was to protect people who cannot make decisions for themselves. Think back to the five core principles of the MCA:

- Presumption of capacity
- Maximising decision making capacity

- Right to make unwise decisions
- Best interests
- Least restrictive option

Thinking about your experience:

- Have these basic principles been implemented and if so has this lead to a change in the way care is delivered?
- Do you have experience of how things were before the MCA (before 2007); how does it compare with how it is today? Has there been a significant change (better or for worse) or is it pretty much the same?

The Committee are trying to see if there has been a notable change in the culture of care.

- If you feel there has been a change, try and provide an example of what that change looks like in practice.
- If you do not think there has been a change, do you have a view about why this change hasn't happened?

Remember: one of the reasons behind the MCA was concern about whether people's human rights were being respected, protected and fulfilled. There is more information about human rights on p.9

QUESTION 9: The MCA and different groups of people

Q9. Is there any evidence that the provisions of the MCA affect some groups disproportionately? If so, what data exists to compare representation across different socio-economic groups, Black and Minority Ethnic groups, and gender?

WHAT WE THINK THIS QUESTION MEANS:

There are a few parts to this question:

Is there any evidence that the provisions of the MCA affect some groups disproportionately?

- Do you feel that the MCA is applied in a different way to different groups of people for unfair reasons?
- For example do you think professionals using the MCA make different decisions about a person who lacks capacity depending on their gender, social class or race?

If so, what data exists to compare representation across different socio-economic groups, Black and Minority Ethnic groups, and gender?

- Do you have a specific example showing how the MCA is being applied differently to different groups of people, or do you know of any evidence that shows that there is a difference?

THINGS TO THINK ABOUT:

The Committee are trying to find out if the MCA affects some groups “**disproportionately**”: this means that some groups of people are unfairly affected by the MCA more than others. For example are discriminatory attitudes contributing to some groups being **disproportionately** affected by the MCA.

- Do you have any personal experience of this, either as a person directly affected by the MCA, or as a professional?
- If you believe the MCA does affect some groups disproportionately do you know of any evidence to support this position?

Decision making

The next set of questions are about decision making. These questions are trying to unpick whether when the MCA is applied in practice, the decision making process is safe and fair. This section is particularly relevant for individuals and organisations that have experience of providing advocacy and support to individuals who have had their capacity questioned.

QUESTION 10: Enabling decision making

Q10. Are those directly affected by the Act being enabled and supported to make decisions for themselves to a greater or lesser extent than they would have been in the past? Does the means by which the decision is made – ‘general authority’, Lasting Power of Attorney, deputyship, Court of Protection – affect the quality of decision making?

WHAT WE THINK THIS QUESTION MEANS:

There are a few parts to this question:

Are those directly affected by the Act being enabled and supported to make decisions for themselves to a greater or lesser extent than they would have been in the past?

- Has the MCA lead to a change in how individuals lacking capacity (or their families, friends, and non-professional carers) are supported to take decisions on their own behalf (or on behalf of individuals lacking capacity)?
- Is the support provided to individuals better or worse than it was before the MCA was law?

Does the means by which the decision is made – ‘general authority’, Lasting Power of Attorney, deputyship, Court of Protection – affect the quality of decision making? (see p.8/p.26 for an explanation of these terms)

- Do the methods that are provided by the MCA (Lasting Power of Attorney, Deputies, Court of Protection) to make decisions affect the quality of decision making?
- Do these methods make for better or worse decision making?
- Are these methods effective at making sure that safe and fair decisions are made?

THINGS TO THINK ABOUT:

Those **‘directly affected’** by the Act are those individuals who lack the mental capacity to make particular decisions for themselves or those who have to make decisions on their behalf in a non-formal way such as family, friends and non-professional carers.

The **‘decisions’** referred to could be anything from day-to-day decisions such as what to wear, to major decisions such as whether to undergo surgery.

Individuals might be **‘enabled or supported’** in their decision-making in a number of ways, and the most effective way to support an individual will vary depending on their circumstances.

‘The means’ refers to the different ways decisions are made under the MCA, for example via the Court of Protection or via a deputy that has been appointed to make decisions on behalf of a person who lacks capacity.

- In your experience are these different methods effective and do they result in safe and fair decisions being made?
- Are people’s human rights being respected, protected and fulfilled?

QUESTION 11: Advance decisions to refuse treatment

Q11. What evidence is there that advance decisions to refuse treatment are being made and followed?

WHAT WE THINK THIS QUESTION MEANS:

- In your experience are many people making advance decisions about medical treatment they do not want, should they lose capacity?
- Are those decisions then followed when an individual loses his/her mental capacity?
- Do you know of any evidence to support your view?

THINGS TO THINK ABOUT:

This question refers to decisions made by an individual who has capacity about their future care should they ever lose capacity.

An **‘advance decision’** (previously known as ‘advance directive’) allows someone to specify the types of treatment that they do not want, should they lack the mental capacity to decide this for themselves in the future.

Think about your own personal experience:

- Are health and social care services encouraging patients to make advance decisions?
- Are you a professional that has a role in ensuring advance decisions are followed? Does this always happen in practice?
- Have you, or someone you know, had experience of an advance decision not being followed?

QUESTION 12: Involvement of carers and families in decision making

Q12. Has the MCA fostered appropriate involvement of carers and families in decision-making?

WHAT WE THINK THIS QUESTION MEANS:

- Does the MCA ensure that carers and families are supported to get involved in decision-making in an appropriate way?
- Do you feel that the MCA prevents or promotes carers and families from being involved in the decision-making?
- Do you think the right balance has been struck being involving carers and families and protecting the rights of the individual?

THINGS TO THINK ABOUT:

The question aims to establish if the MCA encourages the right kind of involvement in decision-making by carers and families.

- Do you feel the right balance has been struck between involving carers and families in decision making where possible, and protecting the rights of the individual (recognising that involvement of families and carers may not always be in the person's best interests).
- Can you think of any examples of good practice or bad practice when it comes to involving carers and families in decision making?

QUESTION 13: The role of IMCAs

Q13. Has the role of the Independent Mental Capacity Advocate (IMCA) succeeded in providing a voice for clients and an additional safeguard against abuse and exploitation for those who have no-one to speak on their behalf?

WHAT WE THINK THIS QUESTION MEANS:

- Are individuals who lack mental capacity (who has no carer or close family member to support them) given a voice through the IMCA service?
- Does the IMCA service provide an additional safeguard against abuse and exploitation of individuals who lack capacity and do not have a support network to advocate for them?

THINGS TO THINK ABOUT:

The IMCA role was created as part of the MCA, to provide an additional safeguard against abuse and to ensure individuals are supported as much as possible to be involved in decision-making and have their voice heard in the decision-making process.

- Do you think the IMCA role is a success?
- What is your personal experience of IMCAs?

- Are you a professional that works alongside IMCAs? Are you an individual that has experience of being supported by an IMCA? Try and include examples from this experience in your response.
- In your experience do IMCA's have enough training about human rights so that they are able to represent clients appropriately?

For more information about the role of Independent Mental Capacity Advocates (IMCAs) see p.8.

QUESTION 14: IMCA referrals

Q14. Has the level of referrals to IMCAs met expectations? What are the reasons for the regional variations in the number of referrals?

WHAT WE THINK THIS QUESTION MEANS:

There are a few parts to this question:

Has the level of referrals to IMCAs met expectations?

- There are fairly low rates of IMCA referrals nationally, what is your experience?
- Are IMCAs being used in the way they should be?

What are the reasons for the regional variations in the number of referrals?

- There are regional variations in the number of IMCA referrals, do you have an opinion about why this might be? For example low levels of awareness about the MCA amongst professionals (and when an IMCA referral should be made) could be one explanation, there may be others you can think of.

THINGS TO THINK ABOUT:

There have been concerns about the low rates of IMCA referrals in adult safeguarding cases in recent years, which suggests that IMCA services are not being used as much as they should be.

- Does this reflect your own experience?
- Do you work for an organisation that makes referrals to IMCA services? Are you an advocate who works for an IMCA service? Think about your own experience of the use of IMCAs (either on a personal or organisational level) and include this in your response.

There are also significant regional variations in levels of referrals, remember to make sure you include which part of the country you live as the Committee will be trying to build up a picture of these regional variations.

QUESTION 15: IMCA skills and training

Q15. Are IMCAs adequately resourced and skilled to assist in supported or substituted decision making for people lacking capacity?

WHAT WE THINK THIS QUESTION MEANS

- Are there enough of the right resources for IMCAs?
- Are there enough skilled IMCAs?

THINGS TO THINK ABOUT

- Ensuring IMCA services have the resources to make applications is a key aspect of supporting the independence of the service. What is your experience of the available resources?
- Do you have examples of good practice on resources that you could share?
- Are there improvements which could be made to the resources which are available?
- A recent [Government report which included views of IMCAs](#) found that IMCAs were concerned about a range of issues including delays in writing reports due to case load, the change of IMCA half way through did not help the clients, not enough frequent contact was made with the clients. Does this reflect your experience?
- In your experience do IMCAs have enough training and access to relevant resources about human rights so that they are able to represent clients appropriately?

Deprivation of Liberty Safeguards

The next questions are on the Deprivation of Liberty Safeguards (DOLS). For an explanation about what the DOLS are see p.8. The Committee want to know whether the DOLS are successfully protecting individuals, and if they aren't protecting people, why not?

QUESTION 16 and 17: DOLS safeguards

Q 16: Are the safeguards in the Deprivation of Liberty Safeguards (DOLS) adequate?

WHAT WE THINK THIS QUESTION MEANS:

- Have the safeguards been successful in preventing the inappropriate deprivation of people's liberty?
- Can you think of any cases where a person has been inappropriately deprived of their liberty?

Q 17: Are the processes for authorisation, review and challenge of DOLS sufficiently clear, accessible and timely?

WHAT WE THINK THIS QUESTION MEANS:

Authorisation of DOLS:

- In your experience, do professionals understand when a DOLS order is required? In other words when a person who lacks capacity is about to be deprived of their liberty do professionals understand that they have an obligation to apply for authorisation to deprive that person of their liberty?
- Is the authorisation process easy to understand for everyone involved? For example the professional applying for an authorisation, the authority granting the authorisation, the person the DOLS applies to, and their family members and carers?
- In your experience, is a person only deprived of their liberty after the correct authorisation has been received and not before?

Review of DOLS:

- The person concerned, or their representative, has a right to request a review of the decision to deprive a person of their liberty. In your experience do people know about this review mechanism and how to access it, and are people using their right to review?
- Is the review process easy to understand?
- Does the review process happen in a timely manner?

Challenge of DOLS

- The person concerned, or their representative, has a right to appeal a decision to deprive a person of their liberty. In your experience do people know about this right to challenge and how to make a challenge, and are people using their right to challenge?
- If a challenge is made is it dealt with in a timely manner?

THINGS TO THINK ABOUT:

For an explanation of what the DOLS are see p.8.

A '**deprivation of liberty**' can take many forms. For example, decisions might be made about who can visit a person, what treatment a person should have, or a person's movements might be restricted. Any 'deprivation of liberty' must be in the **best interests** of the person concerned.

The DOLS are a set of safeguards that are designed to ensure that the decision to deprive a person of their liberty is safe and fair and is **only carried out in a way that protects their human rights**. In practice this means professionals who wish to deprive someone who lacks capacity of their liberty must have this authorised by a supervisory body, and there is a review mechanism and right to challenge a DOLS application.

What is your experience of DOLS?

- Do the professionals you work with know what DOLS are and how to use them?
- Are people who have had their liberty deprived using DOLS aware of the review process and the right to challenge? Try and include examples from your own experience of DOLS when answering these questions.

The Court of Protection and the Office of the Public Guardian

This set of questions are concerned with the roles of two important bodies: the Court of Protection and the Office of the Public Guardian. An explanation of both is given on p.8/9 this Guide. The Court of Protection has direct decision-making powers and the power to appoint 'deputies' to make decisions on a person's behalf. It is also a place where decisions can be challenged. The Office of the Public Guardian provides support to these deputies and also to 'attorneys' who may make decisions on a person's behalf under a 'Lasting Powers of Attorney' (LPA). The Committee is concerned about whether the safeguards in the MCA are good enough, namely whether individuals directly affected by the MCA are able to challenge decisions effectively. This includes the issue of whether institutions such as the Court of Protection are 'accessible'.

QUESTION 18: Accessibility and effectiveness of the Court of Protection and the Office of the Public Guardian

IMPORTANT! While you may disclose information about proceedings in the Court of Protection directly to the Committee, if you disclose this information to anyone else (including publicising your evidence externally) this could be considered a contempt of court which is punishable by law.

Q18: Are the Court of Protection and the Office of the Public Guardian sufficiently understood and accessible to all? Are they operating effectively and successfully?

WHAT WE THINK THESE QUESTIONS MEAN:

We think this is asking a few things:

Are the Court of Protection and the Office of the Public Guardian sufficiently understood and accessible to all?

- Do you think people who use the MCA in their work (for example social workers, advocates) or are directly affected by the MCA (individuals, carers), are aware of the role of the Court of Protection and the Office of the Public Guardian?
- Do you think people know how to access the Court of Protection and the Office of the Public Guardian?

Are they operating effectively and successfully?

- If you have experience of the Court of Protection and / or Office of the Public Guardian are they operating effectively and successfully in your view?

THINGS TO THINK ABOUT:

When thinking about whether the Court of Protection and the Office of the Public Guardian are understood and accessible to all, you might want to think about your own knowledge about these institutions, and the knowledge of the people around you (for example colleagues, advocates, families, and carers).

Do you / those around you know:

- The role of the Court of Protection / Office of the Public Guardian?
- Would you know how to get involved in the decision-making of the Court of Protection?
- Would you know how to challenge a decision in the Court of Protection?
- Would you know how to contact the Office of the Public Guardian?

If you have experience of the Court of Protection or the Office of the Public Guardian, has this experience been good or bad? What do they do well? Where could they improve? Try and back up your opinions with evidence from you or your organisations' experience.

QUESTION 19: Impact of Lasting Powers of Attorney

Q2: What has been the impact of the introduction of Lasting Powers of Attorney (LPA), especially with regard to decision making on matters of personal care and welfare?

WHAT WE THINK THIS QUESTION MEANS

- Have the overall impact of the introduction of LPA been positive or negative with regard to decision making on matters of personal care and welfare?
- Give examples to support your view.

THINGS TO THINK ABOUT:

A **Lasting Power of Attorney (LPA)** is a document that authorises a person ('the attorney') to make decisions on behalf of another person ('the donor'). The donor must consent to the creation of a **LPA**, and to be valid, the **LPA** must be registered with the **Office of the Public Guardian**.

Matters of **personal care** range from doing someone's shopping to helping them with tasks at home. Matters of **personal welfare** include making decisions about who someone sees to dealing with someone's 'personal correspondence and papers'.

Any action taken under a **LPA** must be in the best interests of the person who lacks capacity.

When answering these questions think about:

- Has the introduction of LPA given the individuals directly affected by the MCA (in this case 'the donor') greater control with regards to decision-making?
- Have there been any other advantages for the donor? For example, has the LPA made it easier for the donor to make arrangements for their care?
- Have those people entrusted with decision-making powers under a LPA ('attorneys') exercised these powers responsibly?
- Are there sufficient safeguards in place to ensure people entrusted with decision-making powers under a LPA ('attorneys') do not abuse their power?

QUESTION 20: Costs to access the Court of Protection and Office of the Public Guardian

Q3: What concerns, if any, are there regarding the costs associated with registering an LPA, or with making an application to the Court of Protection?

WHAT WE THINK THIS QUESTION MEANS

- There are costs associated with accessing the Court of Protection or registering with the Office of the Protection, do you have any concerns about this?

THINGS TO THINK ABOUT:

It costs £130 to register an LPA, and £400 to start proceedings in the Court of Protection.

- Do you think these kinds of costs deter people from using these safeguards provided for in the MCA? Or do you think they are fair? What is your experience?

QUESTION 21: Legal aid

Q4: Is legal aid available and sufficient? What impact will the recent and proposed reforms to legal aid have?

WHAT WE THINK THESE QUESTIONS MEAN:

We think this question is asking a few things

Is legal aid available and sufficient?

- Is legal aid available so that people can access the Court of Protection if they need to?
- Is there enough legal aid to ensure those who need legal aid can access it?

What impact will the recent and proposed reforms to legal aid have?

- There have been significant reforms to the legal aid system in recent years, which has led to a dramatic reduction in the legal aid budget. What kind of impact do you believe this will have on people trying to access the Court of Protection? Do you have any evidence to support your view?

THINGS TO THINK ABOUT:

The Government made reforms to the legal aid system that came into force on 1 April 2013. Legal aid is still available for some applications to the Court of Protection, but all applications are means tested. Your individual income and capital (including any savings) must be less than £8,000. Previously anyone in receipt of either Income Support, income related Job Seekers Allowance, Employment and Support Allowance or Guaranteed Pension Credit would immediately pass the means assessment, but this is no longer the case.

What kind of impact do you think these changes will have on individuals trying to access the Court of Protection?

Regulation

These questions relate to the regulation of the MCA, and whether there is a case for additional regulation of the use of the MCA more widely. The Care Quality Commission has been monitoring the DOLS (a part of the MCA) since 2009, but has no direct powers to enforce the MCA.

QUESTION 22 AND 23: Monitoring and regulation by the CQC and others

Q22: Is the role of the Care Quality Commission in inspecting on the MCA standards adequate and appropriate? Is there a case for additional powers?

WHAT WE THINK THESE QUESTIONS MEAN:

- The Care Quality Commission (CQC) monitors the use of DOLS but not the MCA more widely, do you think there is a case for extending the powers of the CQC to cover the MCA more widely?
- What do you think the benefits would be of doing this? Do you think there would be any problems with doing this?

Q23: Should other regulatory bodies, such as health and social care professional regulators, be acting in this area?

WHAT WE THINK THIS QUESTION MEANS:

- There are other regulatory bodies, such as the Ombudsman (that can investigate complaints about health and social care services), and professional bodies such as the Royal College of Nursing (and similar bodies that have a role in monitoring professional standards) that could be involved in monitoring the use of the MCA. Do you think other regulatory bodies should be involved in monitoring and regulating the MCA?

THINGS TO THINK ABOUT:

- The Care Quality Commission recently published a report into the DOLS that found that there is widespread misunderstanding of the MCA and called for more work by service providers and commissioners to ensure the MCA is understood and implemented properly in frontline practice.
- Do you think there is a case for extending the powers of the CQC so they can play a formal role in monitoring the use of the MCA, or do you think another regulatory body would be better placed to do this?
- Perhaps you don't think increased regulation is necessary, if not, why not?

Other legislation

The Committee is interested to find out more about how the MCA has integrated into the mental health system (the existing structure for treating patients with mental health issues) and how it works with the Mental Health Act 1983 (MHA) in particular. Therefore you might want to consider how the MCA and the MHA work together, and any areas of confusion or misunderstanding between the two pieces of legislation.

QUESTION 24: Other Legislation

Q24: How well is the relationship with the mental health system and legislation understood in practice?

WHAT WE THINK THIS QUESTION MEANS:

- Do professionals working in the wider mental health system understand the role of the MCA in practice and how it relates to existing mental health legislation?
- Do professionals understand when to use the MCA and when to use the MHA?

THINGS TO THINK ABOUT:

One of the main concerns about the MCA has been the lack of understanding that many professionals working in the field of health and social care have about when to use the MHA and when to use the MCA.

- Are you a professional using the MHA and/ or the MCA? Do you understand when to use the MHA and when to use the MCA? Do you think your colleagues understand how the relationship between the two pieces of legislation works in practice? Does this understanding vary depending on the sector?
- Are you an individual who has been directly affected by the MCA and the MHA? Do you understand the differences between the two pieces of law and how they applied to you in your situation?

Devolved administrations and international context

The MCA only applies to England and Wales, in Scotland the mental capacity legislation is Adults with Incapacity (Scotland) Act 2000, and Northern Ireland does not have a specific Act regarding mental capacity but is governed by Common Law. The following questions look at different implementation of the MCA in England and Wales, and lessons that can be learnt from other parts of the UK and internationally.

QUESTION 25 and 26: Implementation of the MCA in Wales / Lessons from other places

Q25: Does the implementation of the Mental Capacity Act differ significantly in Wales?

WHAT WE THINK THIS QUESTION MEANS:

- There are some formal differences in the way that the Mental Capacity Act works in England and Wales (see below for examples).

- Do these differences affect how the MCA has been implemented in in England and Wales? Do you have any examples of how this implementation differs in practice?

Q26: What lessons, if any, can be learnt from the approaches taken to mental capacity legislation in Scotland and Northern Ireland, or in other jurisdictions?

- If you are aware of different mental capacity legislation across the UK (or in other countries), do you think there are lessons that can be learnt from these different approaches?
- Remember to state why and try and think of examples illustrating why one system of operation is more successful than others.

THINGS TO THINK ABOUT:

There are some differences in the way that the Mental Capacity Act works in England and Wales. For example there are different regulations in England and Wales for setting up and managing the IMCA service. In England the service is delivered through **local authorities**. In Wales it is delivered through **local health boards**.

Examples of differences in mental capacity legislation across the UK:

- England and Wales uses the terminology “vulnerable adults” in the MCA, whereas Scotland talks of “adults at risks of harm” and has three laws on this issue. These are the Adults with Incapacity (Scotland) Act (2000); Mental Health (Care and Treatment) (Scotland) Act (2003); and Adult Support and Protection (Scotland) Act (2007).
- In Northern Ireland issues regarding mental capacity are governed by common law (law developed through the cases in the courts rather than a piece of specific legislation).

If you are aware of other mental capacity legislation that the Committee may be interested to know about try and include references to further information in your evidence.

QUESTION 27: Compliance with the United Nations Convention on the Rights of Persons with Disabilities

Q27: Is the MCA compliant with the United Nations Convention on the Rights of Persons with Disability (CRPD)? Are there lessons that can be learnt from the CRPD for the successful implementation of the MCA?

WHAT WE THINK THESE QUESTIONS MEAN:

We think this is asking a few questions:

Is the MCA compliant with the United Nations Convention on the Rights of Persons with Disability (CRPD)?

- The UK has signed and ratified the United Nations Convention on the Rights of Persons with Disability (see below for more details).

- In your opinion is the MCA compliant with the CRPD? For more information about the CRPD rights you can read the [Equality and Human Rights Commission CRPD Guide](#)

Are there lessons that can be learnt from the CRPD for the successful implementation of the MCA?

- The CRPD has been a useful lobbying tool for organisations and individuals campaigning to improve the lives of disabled people. Are there any lessons that can be learnt from this experience that could be useful when thinking about how best to ensure the MCA is properly implemented and applied?

THINGS TO THINK ABOUT:

What is the CRPD: The UK has signed and ratified the United Nations Convention on the Rights of Persons with Disability. This means the UK Government has agreed to respect, protect and fulfil the rights of disabled people, and is examined on its progress every five years. The Convention is not legally enforceable by individuals within the UK (you cannot take a case in a UK court in the same way as you can with the Human Rights Act) but the Government should be considering its commitments under the CRPD when developing and implementing new laws and policies. This includes the MCA.

This question is about your thoughts on whether the MCA is compatible with the CRPD and if the implementation of the MCA could be improved by looking at the CRPD in more detail. For example some issues of capacity in the MCA may be relevant to a range of CRPD rights, such as:

- Liberty and security of person (Article 14 CPRD) says disabled people who have been deprived of their liberty should be treated on equal basis with others. How does this relate to the way the MCA is applied?
- The right to independent living (Article 19 CPRD) refers to the rights of disabled people to live their life fully, have a say over where they live, and raises many issues around social and welfare rights. How does this relate to the MCA's best interests-principle when a decision is being made about where to accommodate an individual lacking capacity?

Thinking about the implementation of the MCA:

- Disabled peoples' participation was at the core of creating the CPRD. Should more individuals who lack capacity and/or their families and carers be involved in improving the MCA?
- The CPRD says it is important disabled people are involved in the monitoring of whether the Government is implementing the CPRD. Are there more ways that people directly affected by the MCA could be involved in monitoring the MCA?