

## **MENTAL CAPACITY ACT HOW DOES IT APPLY TO CHILDREN AND YOUNG PEOPLE**

This summary looks at the few parts of the Act that may affect children under 16 years of age. It also explains the position of young people aged 16 and 17 years and the overlapping laws that affect them.

Within the MCA's Code of Practice, 'children' refers to people aged below 16. 'Young people' refers to people aged 16–17. This differs from the Children Act 1989 and the law more generally, where the term 'child' is used to refer to people aged under 18.

In this summary, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

### **SUMMARY**

#### **Children under 16**

The Act does not generally apply to people under the age of 16 but there are two exceptions:-

- 1) The Court of Protection can make decisions about a child's property or finances (or appoint a deputy to make these decisions) if the child lacks capacity to make such decisions within Section 2(1)\* of the Act and is likely to still lack capacity to make financial decisions when they reach the age of 18 (Section 18(3)).
- 2) Offences of ill treatment or wilful neglect of a person who lacks capacity within Section 2(1)\* can also apply to victims younger than 16 (Section 44).

#### **Young people aged 16–17 years**

Most of the Act applies to young people aged 16–17 years, who may lack capacity within Section 2(1)\* to make specific decisions but there are three exceptions:-

\* the lack of capacity to make a decision is caused by an impairment or disturbance that affects how the mind or brain works

- 1) Only people aged 18 and over can make a Lasting Power of Attorney
- 2) Only people aged 18 and over can make an advance decision to refuse medical treatment.
- 3) The Court of Protection may only make a statutory will for a person aged 18 and over.

### **Care or treatment for young people aged 16–17**

People carrying out acts in connection with the care or treatment of a young person aged 16–17 who lacks capacity to consent within Section 2(1)\* will generally have protection from liability (Section 5), as long as the person carrying out the act:

- has taken reasonable steps to establish that the young person lacks capacity
- reasonably believes that the young person lacks capacity and that the act is in the young person's best interests, and
- follows the Act's principles.

When assessing the young person's best interests, the person providing care or treatment must consult those involved in the young person's care and anyone interested in their welfare – if it is practical and appropriate to do so. This may include the young person's parents. Care should be taken not to unlawfully breach the young person's right to confidentiality (see chapter 16 of the Code of Practice)

Nothing in Section 5 of the Act excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in carrying out the act.

### **Legal proceedings involving young people aged 16-17**

Sometimes there will be disagreements about the care, treatment or welfare of a young person aged 16 or 17 who lacks capacity to make relevant decisions. Depending on the circumstances, the case may be heard in the family courts or the Court of Protection.

The Court of Protection may transfer a case to the family courts, and vice versa. This means that the choice of court will depend on what is appropriate in the particular circumstances of the case. For example, if the parents of a 17 year old who has profound learning difficulties cannot agree on the young person's residence or contact, it may be appropriate for the Court of Protection to deal with the disputed issues as any orders made under the Children Act 1989 will expire on the young person's 18<sup>th</sup> birthday.

\* the lack of capacity to make a decision is caused by an impairment or disturbance that affects how the mind or brain works