



# Incapacitated person – a modern definition

**Summary of responses**  
December 2011

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# 1. Introduction

- 1.1. This summary of responses follows the consultation on modernising the definition of “incapacitated person” for tax purposes.

## The current definition

- 1.2. The legal definition<sup>1</sup> that is used for the purposes of direct taxes (i.e. income tax, capital gains tax, corporation tax, stamp duties, inheritance tax) is  
**“any infant, person of unsound mind, lunatic, idiot or insane person”**
- 1.3. The definition is used in conjunction with other legislation to transfer certain taxpayer obligations and rights from a person defined as an incapacitated person to another individual. For example, incapacitated persons are relieved of the need to tell HM Revenue and Customs (“HMRC”) about their tax affairs and pay tax on their earnings, and the duty to do so is instead fully transferred to another appropriate person (which will often be those persons’ guardians, parents or equivalents).
- 1.4. The legal provisions that rely upon the definition can be found at Annex B of the consultation document.

## The consultation

- 1.5. In 2010 the Exchequer Secretary to the Treasury gave a commitment to consult with an intention to update the current definition. The consultation document was published on 24 May 2011 and invited comments by 16 August 2011 on:
  - whether the existing definition currently works; and
  - how a new definition should be constructed.
- 1.6. A summary of tax impacts, including equalities impacts, was published in chapter two of the consultation document.
- 1.7. HMRC is extremely grateful for the time and effort devoted by respondents to considering the issues raised by these consultation documents and for attending meetings. 18 formal written replies were received in response to the consultation document and a list can be found at Annex A.
- 1.8. The Government is very pleased with the positive tone of the responses to the consultation and welcomes the opportunity that has arisen to widen the scope of the underlying work. Some of the next steps to be taken are outlined in chapter three of this document.

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<sup>1</sup> Section 118(1) of the Taxes Management Act 1970

## 2. Responses

- 2.1. This summary of responses addresses each question asked by the consultation document in turn. The consultation itself was split into two parts for discussion – Chapter 3 addressed the law and current practice; Chapter 4 proposed three options for a new definition.

### Chapter three: The law and current practice

#### **Question 1 Are the policy principles which guide this consultation correct and fair? (See table below for principles)**

- To modernise the language used in the existing provision to define “incapacitated persons” with a view to ensuring that the definition is set in the context of a more modern understanding of mental health and capacity. We wish to move away from terms that carry the stigma attached to the words used in the current definition.
- To maintain the scope of the definition by ensuring that, as far as possible, incapacitated people covered by the existing provision are covered by the new definition, whilst avoiding inadvertently extending it to other groups.
- To ensure the new definition interacts with the ‘reasonable excuse’ provisions (e.g. at section 118(2) of the Taxes Management Act 1970) so that taxpayers or those acting on their behalf do not face penalties in inappropriate circumstances.

- 2.2. Almost all respondents agreed unequivocally that the principles were correct and fair. A few respondents did question whether it was legitimate to aim for, as an objective, no change in the scope of people who might fall inside or outside the definition. If the number of people who were defined as “incapacitated persons” increased as a result of a change to the definition, then it was their view that this was not necessarily an undesirable result. One respondent pointed out that, since the legal meaning of the offensive terms was unclear, it was impossible to recreate an equivalent scope exactly.

#### **Question 2 Who should be the recipient of the obligations and rights that are transferred from the incapacitated person?**

- 2.3. This question provided the widest variety of answers. However, all did agree that, whatever arrangements are made, all parties concerned (the transferee, transferor and HMRC) had to be clear from the outset as to their rights and obligations. It was generally recognised that this is not currently the case.

- 2.4. Another area where there was general agreement was that formal transfer of rights and obligations should be the “last resort”. This was because it was seen as both administratively burdensome as well as contrary to the presumption that a person should be regarded as having necessary capacity to make a decision, unless there was compelling evidence to the contrary. In the absence of a formal transfer, there was also broad consensus that HMRC should continue to work with informal representatives of incapacitated persons as far as possible.
- 2.5. Many responses stressed that, in the vast majority of cases, there would be no formal appointment of a deputy or attorney and that the incapacitated person would need to rely upon informal assistance. This would generally be on the grounds of cost and complexity. Many noted that HMRC’s procedures and processes were not sufficiently flexible at the moment to deal with these arrangements satisfactorily.
- 2.6. However, most noted also that it was undesirable to transfer the actual legal obligations to these informal intermediaries. There was a recognition that, where warranted by the circumstances, HMRC needed to be able to rely upon a formal procedure (whether instigated by the incapacitated person themselves, HMRC or a third party) to require resolution of open tax issues.

**Question 3 Do you agree that the current practice in relation to taxation obligations and mental incapacity is working satisfactorily? If not, please give examples to illustrate the difficulties you see. HMRC would also welcome respondents’ views on any of its existing guidance and how it could be improved.**

- 2.7. Although there were no specific cases reported by respondents where HMRC was seen as attempting to apply the current law too strictly, several respondents did state that, in their view, the current practice was not always running satisfactorily. This related almost exclusively to the pursuit of unpaid tax.
- 2.8. Several respondents asked that HMRC revisit its guidance for officers in relation to those dealing with people who have mental health conditions. It was considered that the guidance needed to be more explicit in some cases that fluctuating mental health could constitute a reasonable excuse and some respondents had experience where the current guidance had created difficulties. Additionally, it was thought by some that debt recovery officers would benefit from more detailed guidance on how to deal with cases of mental health conditions sensitively and appropriately.

**Question 4 Are there any other legal considerations that need to be taken into account if the current definition is changed?**

- 2.9. Many respondents expressed strong reservations about the current wider tax law provisions that rely upon the current definition of incapacitated person. There were strong concerns that there was wide ignorance of the strict legal interpretation of provisions such as section 72 Taxes

Management Act 1970 (deeming that, where a person comes within the definition of an incapacitated person, the representative is personally responsible for meeting the tax liabilities).

***“HMRC should take the opportunity for wider revisions, rather than attempting to keep within the scope of the existing S118.”***

- 2.10. Responses from groups representing professional representatives were particularly concerned about the position of professionals as it is currently understood. In particular, they noted that if the position was that representatives could become personally liable for tax debts in excess of the estate or assets of the incapacitated person from whom the obligation had been transferred, then there was an urgent need for reform.

***“The obligations of any such representative can only properly be commensurate with the degree of control that that person has over the assets of the mentally incapacitated person”***

- 2.11. Some respondents expressed concern that the consultation document did not explicitly recognise that there are differences in the applicable mental health legislation for Scotland and Northern Ireland. Other respondents were concerned that the principles of the Equality Act 2010 and UN Convention on the Rights of Persons with Disabilities needed to be considered.

#### **Chapter four: Options for a new definition**

##### **Question 5 Do you agree that the current definition is no longer suitable or do you think there are reasons for leaving it as it is?**

- 2.12. All respondents were unanimous in agreement that the definition was no longer suitable. The terms were seen as anachronistic and offensive and potentially perpetuating discriminatory treatment.
- 2.13. Some representations were also made in respect of the fact that the term “infant” within the definition was also outdated and needed to be changed.

##### **Question 6 Are there concepts in general mental health legislation such as the MCA or MHA that would be appropriate for use in a new definition?**

- 2.14. Most respondents were keen for HMRC to adopt the principles present in the Mental Capacity Act 2005. Linking to these would enable HMRC to follow future changes in the assessment of mental capacity without recourse to tax legislation. In particular, several emphasised that the test for incapacity had to move towards a functional test of an individual’s capacity to make a specific decision rather than a general status test.

***“It makes sense for the definition to reflect existing definitions in mental health legislation rather than (for) the taxes acts to use something different.”***

- 2.15. There was a general recognition that the current “reasonable excuse” provisions were working adequately to ensure that those with temporary incapacity were given sufficient opportunity to continue to manage their taxation affairs. Some respondents asked that HMRC develop a more user-friendly process for the application of “reasonable excuse” which would allow taxpayers to avoid the necessity of its retrospective application. A few respondents also questioned whether the term ‘reasonable excuse’ was suitable for the circumstances faced by those with mental health conditions.
- 2.16. Most of the respondents were keen to stress that, in the vast majority of cases, informal assistance to an incapacitated person would be vital in ensuring taxation obligations were met. Many respondents considered HMRC should do more to develop flexibility in its processes to ensure that such arrangements could operate smoothly.
- 2.17. Some groups who represent those with mental health conditions referred to the “appointee provisions” that are operated by the Department for Work and Pensions (“DWP”). It was suggested that these might be capable of being operated by HMRC in the absence of the current administrative framework.
- 2.18. One respondent was concerned that the MHA definition rested upon a medical diagnosis of the condition. Therefore, they felt that reference to the Equality Act 2010 “adverse effect on day-to-day activities” was more appropriate.

**Question 7 What terms or phrases might a new stand-alone definition include to achieve the policy aims outlined at para 2.1 above?**

- 2.19. Most respondents were clear that relying upon the principles of the Mental Capacity Act 2005 was the best option. In particular, several respondents were keen to ensure that the decision as to whether a particular taxpayer might be incapacitated should be based upon their capacity to make a specific decision rather than a general status-based analysis.
- 2.20. In addition, many stressed that the underlying presumption must always be that any person does have capacity to make a decision until there is sufficient evidence to conclude that they do not. Many recognised the links between a person’s struggle to comply with their tax obligations and the underlying causes of the mental health conditions themselves.

***“Allowing a person to take control of their tax affairs ... may aid the person’s progression towards independence and control ... and in turn benefit the prospects for the person managing the condition.”***

- 2.21. Some respondents suggested words and phrases that are different to those in the Mental Capacity Act 2005. Many of these suggestions concentrated on the fact that the definition should capture only those whose incapacity had the potential for sustained application.

- 2.22. One respondent suggested that the definition needed to focus less on a medical diagnosis and more on the barriers that prevented people with mental health conditions playing an equal part in society.

**Question 8 Would deleting ‘idiot’ and ‘lunatic’ deliver a definition of incapacitated person that meets our policy objectives?**

- 2.23. All respondents were clear that these terms should be removed, but there was a range of responses as to whether this would be sufficient to achieve the policy objectives. Most agreed that, although these terms were particularly offensive, HMRC needed to do more to move to legislation that was more consistent with a modern understanding of mental health conditions.
- 2.24. Many respondents said that the policy objectives needed to be wider than the proposed scope of the consultation – to include improved flexible approaches for HMRC in dealing with incapacitated persons, as well as a robust formal process of appointing a representative in appropriate circumstances.

**Question 9 Is there a hybrid solution which would better achieve the policy aims than a new stand-alone definition?**

- 2.25. If a hybrid solution is to be taken forward, the majority of respondents were anxious that HMRC should follow the principles (and, if possible, the terminology) of the Mental Capacity Act 2005. One respondent was very clear that the Disability Discrimination Act 1995 should not be used.
- 2.26. Many of the bodies representing those with mental health conditions were anxious that the rights of the incapacitated person should not be inadvertently eroded, and that using the Mental Capacity Act as a reference point ensured this should not occur.

***“There are clear protections for the incapacitated person (in the MCA). Protection is afforded to the person lacking capacity by a range of duties laid on the attorney or deputy.”***

- 2.27. Following constructive dialogue at consultation meetings, many responses referred to a different way forward. Many questioned the need for any underlying tax legislation in the area of mental health at all. It was suggested that where HMRC needs to take formal proceedings against a representative of a taxpayer suffering from a mental health condition, then the administrative machinery of the Mental Capacity Act could provide an appropriate route through the courts by the appointment of a deputy (with all the appropriate safeguards). In this, HMRC would be in the same position as any other financial creditor.
- 2.28. This approach would allow for the continued predominance of informal arrangements in relationships between HMRC and the representatives of those with mental health conditions. This would avoid the difficulty of

potentially increasing the scope of those who fall within the current definition.

- 2.29. This approach could also take into account the cases where responsibility for affairs is shared between the donor and the donee (Lasting Powers of Attorney). This would apply particularly in cases of fluctuating capacity.

## 3. Next steps

- 3.1. The Government is committed to removing the offensive and anachronistic phrases from the definition of an incapacitated person in section 118 Taxes Management Act 1970 as soon as possible.
- 3.2. However, as suggested by many respondents, this consultation has raised important supplementary issues in relation to:
  - How HMRC might improve the service that it provides to people with mental health conditions and those who act on their behalf?
  - How HMRC can modernise the legal provisions underlying the appointment of representatives who are required to act on behalf those with mental health conditions?

### Improving service to people with mental health conditions

- 3.3. HMRC has recognised these additional issues and would like to address them.
- 3.4. Firstly, working closely with external stakeholders, HMRC is committed to providing improved guidance for its staff to assist in identifying when those with mental health conditions might have a “reasonable excuse” for being unable to comply with their obligations. Changes will be made to ensure the all of the circumstances encountered by those with fluctuating conditions will be considered.
- 3.5. Secondly, HMRC recognises the important role played by intermediaries and wants to make it easier for all types of intermediary - paid or otherwise - to act on behalf of others. HMRC’s recent consultation on “Establishing the future relationship between the tax agent community and H M Revenue and Customs” sought views on proposals for improving processes for paid tax agents and other types of intermediary with a continuing need to engage and transact with HMRC on behalf of others.
- 3.6. Many of the suggestions made during the course of the consultation on the definition of incapacitated person will be fed into the broader intermediary work to enable HMRC to take a co-ordinated approach to understanding and meeting the needs of vulnerable customers and the intermediaries that help them.
- 3.7. Thirdly, in September, HMRC issued detailed guidance for staff to ensure that cases involving the pursuit of unpaid tax are dealt with appropriately where the taxpayer may be suffering from a mental health condition. HMRC has also established a small team who are currently undergoing specialist training to assist in dealing with very vulnerable people, including those who may have a mental health condition, where tax debts are outstanding.

## Modernising the incapacitated person legal provisions

- 3.8. The Government agrees the need to modernise these provisions and has developed its approach in a manner that supports its objectives of a simpler and fairer tax system and answers many of the points raised in consultation.
- 3.9. The Government's objective is that incapacitated persons should have the same rights and obligations under tax law as they currently would if they were not incapacitated, and that those rights and obligations should be able to be exercised or met with the help of the incapacitated person's representative.
- 3.10. Draft legislation for inclusion in Finance Bill 2012 was published on 6 December. The draft legislation removes the current definition of 'incapacitated person' and in doing so removes the offensive terms within that definition from the statute book.
- 3.11. The draft legislation also removes the current statutory provisions in the Taxes Management Act (and other similar legislation) that transfer certain rights and obligations to the person who represents an incapacitated person. Instead, those rights and obligations will apply to the person with the mental health condition or child with taxable income - these individuals' representatives will then be able to act for them on their behalf as the law allows.
- 3.12. The Government does not think it necessary to retain the existing legislation that automatically imposes obligations under tax law on representatives themselves in relation to tax that would be due from incapacitated persons if they were not incapacitated, so these too have been removed in the draft legislation.
- 3.13. This approach follows the principles identified for this work in the May consultation document that received support from most respondents. Rather than creating a new tax-specific legal framework for incapacitated persons the changes will instead allow the general legal framework for assisting people who lack capacity to operate in its place. By relying on this general framework the way that a representative of an incapacitated person interacts with HMRC will keep pace with any future changes in law that apply generally. It also means that no new definition for tax will be necessary.
- 3.14. A Tax Information and Impact Note and Explanatory Note have been published alongside the draft legislation.

## Annex A: List of stakeholders consulted

The following organisations participated in the consultation, either through a meeting or by providing a written response. Some provided both. HMRC is grateful to all for their contributions.

Association of Disabled Professionals  
Bromleys Solicitors LLP  
Chartered Institute of Taxation (CIOT)  
Citizens Advice  
Equality 2025  
Institute of Chartered Accountants in England & Wales  
Law Society of England & Wales  
Law Society of Scotland  
Low Incomes Tax Reform Group (LITRG)  
MENCAP  
miEnterprise  
MIND  
Norfolk Coalition of Disabled People  
Royal College of Psychiatrists  
Society of Trust and Estate Practitioners  
TaxAid  
TaxHelp for Older People

Two responses were received from private individuals.