



For better  
mental health

**Mind's response to the OFT Consultation:  
Mental capacity – Draft OFT guidance for creditors, December 2010**

Our specific comments below relate only to those sections of the guidance where we feel that we can offer some comment.

**1. About Mind**

Our vision is of a society that promotes and protects good mental health for all, and that treats people with experience of mental distress fairly, positively, and with respect.

The needs and experiences of people with mental distress drive our work and we make sure their voice is heard by those who influence change.

Our independence gives us the freedom to stand up and speak out on the real issues that affect daily lives.

We provide information and support, campaign to improve policy and attitudes and, in partnership with independent local Mind associations, develop local services.

We do all this to make it possible for people who experience mental distress to live full lives, and play their full part in society.

**2. General comments**

As we have said in our response to the independent review of the Lending Code in September 2010, access to credit and financial services is increasingly a core component of modern life and can actively enhance people's lives. The majority of people with mental health problems have the skills and ability to manage their finances. We do not want people with experience of mental distress to be excluded from accessing credit. However there is a need for adequate safeguards to protect people's finances when they are unwell.

People who have mental health problems will often have full mental capacity to make financial decisions, but there may be times when this is not the case. We acknowledge that this is a subject that is often difficult to broach, and also note that there can be sensitivity around raising questions about mental health and mental capacity.

In many instances, making sure that lending policies are fair, proportionate, responsible and sensitive, will safeguard the needs of

consumers with (and without) mental distress, without requiring detailed expert evidence of a mental health condition or proof of capacity to trigger particular adjustments to procedures. This will lead to better outcomes for both consumers and creditors, and should be the guiding principle behind any rules or guidance on this topic.

As we have said in previous responses on financial issues, the problem does not arise because people get into debt; rather it is with 'bad debt'. Creditors cannot enforce contracts in circumstances where the 'bad debt' results from a debtor's lack of mental capacity at the time of making the borrowing decision and this is something that the creditor knew or should have known about. However, the debtor is responsible for proving this is the case.

We welcome the focus on the responsibility of creditors to behave fairly and on consequences should they fail to do so. Lending decisions should be based on rational decision-making rather than misguided notions about mental health and mental capacity.

We have used the terminology used in the draft guidance – debtor to cover customers and applicants, and creditor to mean banks and other lenders – for convenience.

### **3. Questions 1 – 4: Scope of the guidance**

The draft guidance takes care to explain that the fact that having a mental health problem does not necessarily affect mental capacity to make informed borrowing decisions. We would like to see greater emphasis and clarity on this point throughout. It is important to ensure that creditors do not introduce practices that equate knowledge of mental health issues with perceived issues over mental capacity. Factors such as a debtor with a mental health problem having a flagged account so that a bank can monitor erratic spending, should not result in difficulties in obtaining credit difficult due to perceived concerns about a lack of mental capacity.

The example at 1.8 indicates that a debtor is in a mental health unit at the time credit is being applied for. This in itself does not raise an automatic issue about mental capacity and needs to be clarified in the example. However, we imagine that the fact of his current residence should lead a creditor into making further enquiries into the reason for such a large loan and the timing of the request, as well as questions about how repayments will be met. If this is not done, the creditor should bear responsibility if the debtor is unable to repay.

Legally, as mentioned above, the onus is on the debtor seeking to be released from legal duties under a contract to show that it was entered into at a time when he or she was lacking mental capacity, and that the creditor knew or should have known. This can be difficult to do. We are therefore pleased to see that creditors are being reminded of their responsibilities to assess mental capacity and that failure to do so may affect their fitness to carry on a consumer credit business.

#### **4. Questions 9 – 13: Identifying and dealing with mental capacity issues**

We feel that there is still considerable work to do in many areas to address the issues around identifying whether someone has mental capacity to do a particular act at a particular time. Under the Mental Capacity Act 2005, someone should be presumed to have mental capacity in any given situation and making an unwise decision does not overturn this. Work is ongoing in other fields to try to develop tools and a method of decision-making to assess mental capacity, but we are not aware of any particular clinical tests that are in use. We would welcome more research around assessing mental capacity in specific areas of activity and imagine that this should be possible to do in relation to financial decision making.

As part of developing its guidance for creditors, we suggest that the OFT could set out its expectation that creditors should develop appropriate questionnaires and practices aimed at assessing a debtor's mental capacity to make borrowing decisions, to be used as part of the application process. Whilst it does not seem practical or appropriate for a creditor to carry out clinical assessments (paragraph 3.9) they can and should be in a position to undertake initial vetting, having used the expertise that is available to determine what factors may indicate lack of mental capacity in relation to making borrowing decisions. Without professing to be experts, we think it possible that many of the steps taken to detect fraud or circumstances in which a debtor may be under undue influence of another person could be of assistance in developing decision-making tools to assess mental capacity.

At several points throughout the guidance there are references to avoiding unfair discrimination. The underlying concern seems to be that knowledge of a past or recurring mental health disability could lead to assumptions that this may affect a borrower's mental capacity. This may trigger further scrutiny and a credit application is refused. As a result a debtor with a disability may feel that he or she has been treated less favourably or unfavourably, or even subjected to harassment in some circumstances, contrary to the Equality Act 2010.

Our initial thoughts in this complex area are that one way to minimise such risk is to train staff to broach issues about mental health and/or mental capacity in an appropriate way. A good starting point would be training to help raise their awareness of mental health issues, so that questions can be asked that should not cause offence.

Another, perhaps, is to ensure that the assessment of risk and ability to repay are central factors in the application process. Appropriate questions will then be asked to a wide range of applicants for credit, not only those with disabilities. To some extent at least, this process is trying to assess how 'wise' the borrowing decision is, for debtors with capacity as well as any situations where this may be in doubt. A responsible

lender should also ensure debtors do not feel pressurised (and accept responsibility if pressure is brought to bear).

We note your suggestions about asking borrowers to disclose factors relevant to mental capacity. At the time of making a loan application, the debtor may lack insight into his or her situation and in many cases will say there is nothing to disclose. Perhaps it will be more fruitful to concentrate attention on the bigger issues of openness and overcoming stigma around mental health. Creditors can publicise this in marketing material. They can also promote the role of specialist teams which we feel would help get a positive message across. If people are reassured that they will not be judged adversely or treated differently as a result of making a disclosure, then it follows that they will be more inclined to disclose relevant factors at a time when they are capable of doing so.

We welcome suggestions that creditors should have specialist teams to offer support. We have argued for this to happen within the financial sector in other contexts and believe that it would be appropriate to expand the remit of such teams to cover issues about mental capacity.

In relation to the example at paragraph 3.15 of the guidance, it is unclear what view the OFT is taking of the creditors' actions in relation to lending, or of their legal positions in relation to the credit card and loan agreements. Issues of mental capacity aside, we imagine that the bank that granted the application for a £20,000 loan should have discovered by making standard enquiries that the debtor had recently been issued with three credit cards within a short period of time. This would surely justify close scrutiny of the borrowing decision being made by the debtor, alerting a responsible creditor to possible concerns. If it did not, again we would hope that the creditor would take responsibility and write off any resulting debt, even if the legal position on the status of the contract was arguable. The guidance is neutral on the matter and should perhaps be strengthened.

Our final comments relate to the role of family members and others in disclosing concerns about possible lack of capacity to creditors. Mind operates a Legal Advice Service for those experiencing mental distress and their family and friends. Questions about how to notify concerns to banks and other lenders about health and mental capacity issues are fairly common. Often the person who wishes to act is a family member rather than the account holder / card holder.

We appreciate the difficulties under Data Protection Act and in relation to customer confidentiality of discussing the affairs of a customer with a third party. The debtor is entitled to manage his or her own affairs without interference of others, and has a right to privacy. The concerns of others may be well-intentioned and prompted out of concern to protect the debtor's best interests but still interfere with his or her autonomy. Perhaps more thought should be given to considering how specialist teams could help customers to manage their financial affairs. The role of

specialist teams can be publicised, emphasising a commitment to deal sensitively and in a non-discriminatory way with any information that may be given to them. Customers may then be encouraged to use the services of such teams, and to set out in advance ways in which designated and trusted third parties can communicate on their behalf should doubt arise in future about the debtor's mental capacity.

Perhaps there are ways in which creditors should allow third parties to pass information on, and to take steps to verify it. Again there may be parallels with methods used to process information from third parties about possible fraud.

We dealt recently with concerns raised by a caller to our Legal Advice Line whose sister had been taken into a mental health unit in a crisis situation. The sister at that time probably did not have capacity to deal with her financial affairs. It was clear that she would not be able to use her bank cards for some time. The bank cards were missing and the caller was concerned that they could be with someone who knew the account details (but did not have authority to use them). The caller wanted to try to inform her sister's bank about possible unauthorised card use, but bank procedures meant that no-one was prepared to talk to her as she did not have and could not get authority from her sister at that crucial time. We appreciate that there is no easy solution in this type of situation.

Mind has been working with HMRC to explore how that organisation can support the role of third parties (who do not have formal authority to act) in dealing with tax matters on behalf of individuals experiencing mental health problems resulting in lack of mental capacity to deal with tax affairs. Mind would be keen to share the outcomes from this work with the OFT.

**5. Questions 14 – 17: Data Protection Act – Retention of information**

As a very general position, we see the main issue here as a creditor's ability to protect sensitive personal data and to use it appropriately. If a creditor has a transparent, non-discriminatory and fair lending policy and can persuade customers that it will use information about health and mental capacity in an appropriate way, this may encourage informed advance disclosure. A debtor, who chooses to be open, should not then be unfairly disadvantaged when seeking future credit.

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