

Safeguarding and the Mental Capacity Act

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Mental Capacity Act 2005

- Aims to **empower** and **protect** individuals through its principles and provisions.
- **The MCA and the Care Act work** together to promote the empowerment, safety and wellbeing of adults with care and support needs.
- In all safeguarding activity due regard must be given to the Mental Capacity Act 2005

NHS digital 2016-7 – Safeguarding statistics

- NHS digital 2016-7

Mental Capacity Assessment outcomes for concluded s42 enquiries:

33,445 lack capacity

61,140 had capacity

14,480 don't know

7,570 – not recorded

-**after 11 years... MCA practice remains variable**... Strong evidence of widespread misunderstanding and lack of application of the MCA generally.
- House of Lords MCA Post legislative scrutiny report 2014 *'The Act has suffered from a lack of awareness and lack of understanding. The empowering ethos has not been delivered'*. Decisions are based on paternalistic considerations rather than the person's interests.
- *Valuing every voice, respecting every right: Making the case for the Mental Capacity Act*; June 2014. Accepted Lords Report – concluded principles of empowerment and autonomy were poorly understood by professionals.
- Law Commission – *Liberty Protection Safeguards report 2017* – evidence of wide variation in practice
- LGO Ombudsman Complaints Report *The Right to Decide: Towards a greater understanding of mental capacity and deprivation of liberty (2017 re MCA and DOLS 2017*
- CQC *The state of health care and adult social care in England 2017/18*
- Common issues: Omission of application of the Act. No capacity assessments/poor quality. Best interests process not correctly followed. Principles not being followed.

Learning from SARS: A report for the London Safeguarding Adults Board (2017) Braye and Preston-Shoot

An analysis of 27 separate safeguarding adults reviews from 17 safeguarding boards across London – the majority were statutory under s44 of the Care Act.

*‘Twenty one of the 27 reports commented on mental capacity, which represents therefore the most frequently represented learning about direct practice... much of the learning in the SARs is about **missing or poorly performed capacity assessment, insufficient scepticism and respectful challenge of decision-making and possibly consequences, and in some cases about an absence of best interests decision-making**’*

What difference does legislation make? Adult safeguarding through the lens of serious case reviews and safeguarding adult reviews: A report for south west region safeguarding adults boards (October 2017)

This report analysed 37 serious case reviews and adult safeguarding reviews from 13 different safeguarding boards across the south west of England:

‘65%... of SCRs and 82%... Of SARs commented on mental capacity... much of the learning in the reviews is about missing or poorly identified capacity assessments, insufficient discussion amongst the agencies involved of differences of opinion, failure to question and explore choices and decisions with individuals, and in some cases about an absence of best interests decision making’

What we have learnt: Significant issues: MCA Principles

A person must be assumed to have capacity unless it is established that they lack capacity.

Every adult has the right to make their own decisions unless there is proof that they lack the capacity to make a particular decision when it needs to be made. This has been a fundamental principle of the common law.

But if doubt about whether a person has capacity, it's important to complete a capacity assessment to ensure that a person doesn't take decisions they don't understand and afford them the safeguards of the MCA.

You must always have grounds to consider that undertaking a capacity assessment is necessary. Conversely, you must also be prepared to justify a decision not to carry out an assessment where there appeared to be a reason to consider that the person could not take the relevant decision. You should not hide behind Principle 1 to avoid responsibility for a vulnerable individual.

• MCA Principle 2.

- A person is not to be treated as unable to make a decision unless **all practicable steps to help him to do so have been taken without success.**
- It is important to do **everything practical** to help a person make a decision for themselves before concluding that they lack the capacity to do so.
- Not just about the practicable steps to enhance the mental capacity assessment process. **Supported decision making** is the process of decision-making which requires support to be given to a person to make their own decisions, and where such is not possible, for any decision to be taken on the basis of the best interpretation of an individual's known will and preferences.
- It is often the case the case that supported decision-making will result in the person gaining capacity to make a decision.
- Anyone supporting a person who may lack capacity should not use **excessive persuasion or 'undue pressure'**. This might include behaving in a manner which is overbearing or dominating, or **seeking to influence** the person's decision, and could push a person into making a decision they might not otherwise have made. However, it is important to provide appropriate advice and information. (COP2.8)

- **MCA Principle 3.**

- **A person is not to be treated as unable to make a decision merely because he makes an unwise decision.**
- **‘The concept of unwise decision-making faces institutional obstruction’** House of Lords Post Legislative Scrutiny Report 2014.
- Everybody has their own values, beliefs, preferences and attitudes. A person should not be assumed to lack the capacity to make a decision just because other people think their decision is unwise. **This applies even if family members, friends or healthcare or social care staff are unhappy with a decision. (COP 2.10)**
- **Vulnerable people making unwise decisions often need ongoing support.** There may be cause for concern if somebody: repeatedly makes unwise decisions that put them at significant risk of harm... there might be need for further investigation, taking into account the person’s past decisions and choices. For example, have they developed a medical condition or disorder that is affecting their capacity to make particular decisions? Are they easily influenced by undue pressure? Or do they need more information to help them understand the consequences of the decision they are making. (COP 2.11)

Court of Protection: Failure to consider the ‘Causative Nexus’

‘the further away the person’s view is from that of the professionals, the more likely professionals are to say that they lack capacity’

The ‘protection imperative’ – self-reflection/ awareness – detachment and objectivity crucial

Constraint, coercion or undue influence – and not mental incapacity

Making assumptions based on diagnosis

PC and NC v City of York Council 2014 – Issued guidance requiring assessors to evidence that the impairment itself was the cause of the lack of mental capacity

Taking capacity seriously? Ten years of mental capacity disputes before England's Court of Protection (International Journal of Law and Psychiatry, Volume 62, 2.6 2019).

- Specific decision not precisely defined
- Absence or insufficient 'practical steps' taken to maximise capacity
- Lack of evidence of a 'causative nexus'
- Non-consensus in what is required in terms of understanding the 'relevant information' or using and weighing that information
- Real risk of conflating own views and values with a lack of capacity.

Significant issues - Best interests decisions – Wishes and Feelings

Aintree University Hospitals NHS Foundation Trust v James –Supreme Court 2013

- Redefined the role of wishes and feels in the best interests calculation. The purpose of the best interests test was, in the view of Lady Hale, **‘to consider matters from the patient’s point of view’**. The best interests test is not objective.
- In line with Law Commission recommendation, the government has accepted that wishes and feelings should have ‘particular weight’ in the best interests checklist, to bring it towards greater compliance with the United Nations Convention for the Rights of Persons with Disabilities.

Points for Practice:

- Make sure that you are confident in your own understanding of the law, its application and the issues that can arise.
- Ensure you are self-reflective and aware of your own assumptions and bias when assessing capacity and making best interests decisions in order to remain objective and detached.
- Have a person's wishes and feelings as central to your practice.
- Ensure you prepare and understand the person's situation and the issues and options at hand

Safeguarding/ MCA Scenario

Read and discuss at your tables for 5 mins

- Mary is an 84 year old woman who has been becoming increasingly confused over recent months. She lives at home on her own. Her daughter is her main carer, and visits most days.
- Mary's daughter has become very concerned about her mum. On one occasion the police brought her home in the middle of the night in her nightgown, having found her on the street cold and disorientated. She has told her daughter that she is due a prize from the competitions she has been entering, and her daughter is concerned that large sums are being withdrawn from her bank account.
- Other concerns are that Mary has left the gas hob on and burnt a saucepan, has not been washing, and appears to have lost a significant amount of weight. In addition, Mary's daughter visited her mother last week to find the door unlocked and Mary apparently having given her weeks pension money to a group of young people who had come into the house.
- In response, Mary's daughter privately arranged for a care agency to visit twice a day; however this has not sufficiently addressed the risks, and her daughter is still very worried.
- The daughter has contacted the Adult Social Care team advising that her mum can no longer live at home, and needs funding to be arranged for Mary to move to a care home.
- The daughter advises that she thinks that she has a Lasting Power of Attorney, but she doesn't know what type.
- The daughter says that Mary is adamant that she wants to stay at home, and has always said she wouldn't want to go into a care home, but that "she doesn't understand what she's doing".

Discussion Points

1. Does this information indicate that a safeguarding concern and/or s42 enquiry are required, and if so, why ?
2. Do you think it is necessary to assess Mary's capacity and why ?
3. If so, in relation to which decisions ?
4. Considering MCA Principle 2, what would you do to support Mary in this process ?
5. If Mary was found to lack mental capacity to make a specific decision (eg regarding finances, and/or regarding her care needs) and a best interests decision needed to be made, what factors would need to be taken into account?

References & Further Reading

- Department of Health (2005): *Mental Capacity Act 2005*. London. HMSO
- House of Lords (2014), *Mental Capacity Act: Post Legislative Scrutiny* (2014). London HMSO
- Braye and Preston-Shoot (2017), *Learning from SARS: A report for the London Safeguarding Adults Board* . London. London Safeguarding Adults Board
- Department of Constitutional Affairs (2007), *Mental Capacity Act Code of Practice* (2007 Final Edition). London HMSO
- Department of Health (2015) , Knowledge and Skills Statement for Social Workers in Adult Services, (2015) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/411957/KSS.pdf)
- Department of Health and Social Care (2018), *Priorities for Adult Social Work Research: Results from the James Lind Alliance Priority Setting Partnership for adult social work* London. HMSO
- United Nations Convention on the Rights of People with Disabilities *Committee in their General Comment on Article 12.26* (2012)(<https://www.ohchr.org/en/hrbodies/crpd/pages/gc.aspx>)
- Ruck Keene, Kane, Kim and Owen (2019) *Taking capacity seriously? Ten years of mental capacity disputes before England's Court of Protection*, International Journal of Law and Psychiatry, Volume 62, 2.6
- Ratcliff, Daniel, Chapman, Melanie (2016), *Health and social care practitioners experiences of assessing mental capacity in a community learning disability team*, British Journal of Learning Disabilities, 44 (4), pp.329-336.
- Department of Health *Valuing every voice, respecting every right: Making the case for the Mental Capacity Act*; June 2014.
- Law Commission – *Liberty Protection Safeguards report 2017*
- Local Government Ombudsman Complaints Report *The Right to Decide: Towards a greater understanding of mental capacity and deprivation of liberty* (2017)
- Care Quality Commission *The state of health care and adult social care in England 2017/18*
- Case Law: *LB Redbridge v G, C and F* EWHC 405, (2014); *CC v KK* (2012] EWCOP 2136; *PC and NC v City of York Council* EWCA (Civ) 478 2014, *Aintree University Hospitals NHS Foundation Trust v James* –Supreme Court 2013