

# Safeguarding and the Mental Capacity Act

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SSAB Conference – December 2018

## Mental Capacity Act 2005

- Provides a clear framework for assessment and making decisions, to both **Protect and Empower individuals.**
- When applied appropriately it is an empowering piece of legislation that focuses on **individual strengths and civil rights and places the emphasis on the individual making their own decisions.**
- **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

- **....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'*.
- *Valuing every voice, respecting every right: Making the case for the Mental Capacity Act*; June 2014
- 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.

# 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

*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

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

- 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.**



- MCA Principle 3.
- A person is not to be treated as unable to make a decision merely because he makes an **unwise decision**.

## **Significant issues - Mental Capacity Assessments – The ‘Causative Nexus’ – the ‘because of’ test**

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

**Constraint, coercion or undue influence – and not  
mental incapacity**

**Making assumptions based on diagnosis**

## Research – Emerging Themes:

- Specific decision not precisely defined
- Quality of mental capacity assessments - salient information not being given to the person
- Non-consensus in what is required in terms of ‘relevant information’ or ‘using and weighing’
- 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?

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