The Mental Capacity Act in everyday Practice

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Improving lives
The Act has suffered from a lack of awareness and a lack of understanding. For many who are expected to comply with the Act it appears to be an optional add-on, far from being central to their working lives.

The evidence presented to us concerns the health and social care sectors principally. In those sectors the prevailing cultures of paternalism (in health) and risk-aversion (in social care) have prevented the Act from becoming widely known or embedded. The empowering ethos has not been delivered. The rights conferred by the Act have not been widely realised. The duties imposed by the Act are not widely followed.

Need to change this!
Learning objectives

• help GPs feel confident in using the Mental Capacity Act to deliver appropriate care to people who lack capacity
• increase expertise on assessing mental capacity
• increase knowledge on process of arriving at best interests of non-capacitrous individuals
• increase understanding of Mental Capacity Act provisions regarding Lasting Powers of Attorney (LPA)
• increase understanding of the functions of the Court of Protection
• provide an open forum for case discussions, led by our expert panel from our Older People’s Mental Health Services.
The MCA enshrines in law that all individuals over the age of 16 (*in England and Wales*) have the right to autonomy, i.e., the full legal capacity to make decisions for themselves including potentially life ending decisions (*the minimum age for this is 18yrs*), except it can be shown that they lack the mental capacity to make the required decision – MCA Code of Practice para 1.2.

The Act also provides a statutory framework to empower and protect people who may lack capacity to make decisions for themselves and establishes a framework for making decisions on their behalf. This applies whether the decisions are life-changing events or everyday matters - OPG Safeguarding Policy, May 2011 para 8.1.
The Mental Capacity Act is based on 5 principles:

- A person (over 16) must be assumed to have capacity unless it is established that they lack capacity.
- 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.
- A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights & freedom of action.

Under the Act it is a criminal offence to wilfully neglect or ill treat an adult lacking mental capacity to make a required decision - MCA Section 44(2).
Mental Capacity – ability to make a decision – code 4.1:

- An Individual’s ability to understand & retain information about the options available to them, weigh up the different sides of the argument and communicate their preference.

  What matters is their ability to carry out the processes involved in making the decision – and not the outcome - (Code para 4.2)

- For the purposes of the MCA, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain – s2(1) MCA
Lack of Capacity means the individual has an impairment or disturbance that affects how their brain or mind works *(diagnostic test)* and;

The impairment or disturbance affects them in such a way that they are unable to:

- understand information about the decision to be made (‘relevant information’).
- retain that information in their mind
- use or weigh that information as part of the decision-making process, or
- communicate their decision (by talking, using sign language or any other means) – *(functional test)* - s2(1) MCA, para 23.28 code of practice MHA

*It does not matter whether the impairment or disturbance is permanent or temporary – s 2(2) MCA*
Key issues for practitioners
Good practice in Capacity Assessment

Relevant Information (basics)

• the nature of the decision
• the reason why the decision is needed, and
• the likely effects of deciding one way or another, or making no decision at all - Code para 4.16, section 3(4)
• information should be presented in a way that is appropriate to meet the individual’s needs and circumstances - Section 3(2)

By and large the assessor should be equipped with information appropriate to the decision at hand eg for medical treatment, the doctor must explain the purpose and effect of the course of treatment and the likely consequences – MCA code para 3.7
• ‘it is not always necessary for a person to comprehend all peripheral details …’


• -------the question [is] whether the person under review can ‘comprehend and weigh the salient details relevant to the decision to be made’.


• Professionals and the court must not be unduly influenced by the “protection imperative”; that is, the perceived need to protect the vulnerable adult

(Oldham MBC v GW and PW [2007] EWHC 136 (Fam); PH v A Local Authority, Z Ltd and R [2011] EWHC 1704 (Fam)).
Good practice in capacity assessment

Communication

- Break down difficult information into smaller points that are easy to understand and repeat information several times if necessary

- Is help available from people the person trusts

- Be aware of cultural, ethnic or religious factors that shape a person’s way of thinking, behaviour or communication.

- If the person’s capacity is likely to improve in the foreseeable future, wait until it has done so

- Take one decision at a time – be careful to avoid making the person tired or confused and don’t rush.

- Information should be provided using the most effective form of communication for that person (such as simple language, sign language, visual representations, computer support or any other means) - Section 3(2).

*Information must be given in the easiest and most appropriate form of communication for the person concerned to help them make an informed decision*— code para 3.8
Key issues for practitioners

• Ask yourself - does a person have an impairment or disturbance that affects how their brain or mind works, and after they have been given all practical and appropriate support to make the decision for themselves, are they unable to make a specific decision when they need to”?  - Lucy Bonnerjea DoH MCA Policy Unit

• Possession or lack of capacity at the time it needs to be made is “judged” on balance of probabilities. MCA code para 4.10
Who should assess mental capacity?

• The person who assesses an individual’s capacity to make a decision will usually be the person who is directly concerned with the individual at the time the decision needs to be made – (Code para 4.38)

• On treatment related issues it is ultimately up to the professional responsible for the person’s treatment to make sure that capacity has been assessed – (Code para 4.40)

• In complex decisions and where a professional gives advice on an individual’s mental capacity, the final decision about a person’s capacity must be made by the person intending to make the decision or carry out the action on behalf of the person who lacks capacity – not the professional, who is there to advise – (Code para 4.42)
When do we need to assess Mental Capacity (MCA)

- The starting assumption must be that the person has the capacity to make the specific decision (Code para 4.36).

- A mental capacity assessment is needed when a person’s capacity is in doubt (Code para 4.34).

- The person’s behaviour or circumstances cause doubt as to whether they have the capacity to make a decision

- Somebody else says they are concerned about the person’s capacity (Code para 4.35)

or

- The person has previously been diagnosed with an impairment or disturbance that affects the way their mind or brain works and it has already been shown they lack capacity to make other decisions in their life.
"[t]he presumption of capacity does not exempt authorities and services from undertaking robust assessments where a person’s apparent decision is manifestly contrary to his wellbeing" – serious case review into the murder of Martin Hyde, See also MCA Code of Practice para 4.30.

Important to keep comprehensive documentation as Mental Capacity Assessment can be challenged – code 4.10.

The assessor must be able to provide objective evidence to support their belief about the individual’s capacity ie describe the steps they have taken – code para 4.44, para 4.63.

Assessments of capacity to take day-to-day decisions or consent to care require no formal assessment procedures or recorded documentation – code para 4.60.

But it is good practice for paid care workers to keep a record of the steps they take when caring for the person concerned – code para 4.60.
‘The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider the nature of the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be.’

Aintree University Hospitals NHS Foundation Trust v Jam -30/10/13es [2013] UKSC 67 30/10/13
Mental Capacity Act Best Interests process

Devising a plan of action following an assessment of capacity to consent to treatment.

1. **Does the individual have the capacity to make the required decision?**
   - **Yes**: Afford the individual his wishes
   - **No**: Check Validity/Applicability

2. **Check Validity/Applicability**
   - **Valid/Applicable**: Any advance decision relating to the issue at hand?
     - **Yes**: Any Lasting Power of Attorney (personal welfare)?
     - **No**: Consult with the relative(s) and together decide what is in the patient's best interests

3. **Any Lasting Power of Attorney (personal welfare)?**
   - **Yes**: Is there a Court Appointed Deputy?
   - **No**: Consult with the relative(s) and together decide what is in the patient's best interests

4. **Is there a Court Appointed Deputy?**
   - **Yes**: Speak to the relative(s) and together decide what is in the patient's best interests
   - **No**: If no relatives, you may need an IMCA and together with the IMCA work out what is in the patient's best interests

5. **If treatment pertains to life and death and leaves no time for the care giver to go through the above process, the Act allows the care giver to administer treatment based on what he believes to be in the patient's best interests (section 5 and section 26(5) MCA)***

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**Note:**
- (a). This chart is also applicable to patients under the Mental Health Act but whose treatment is not governed by Part IV of the Mental Health Act. These include patients detained under s4(4)(a), s5, s35, s37(4), s135, s136, and those conditionally discharged by the MHRT (and not recalled to hospital). Such patients may be treated under the provision of the MCA. However, in some instances common law will apply. (b). Advance decisions can only be made for issues relating to treatment and can only be made to refuse and not to accept specified treatments. (c). This chart can also be applied to issues relating to other aspects of personal welfare and property and affairs.

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*The Court appointed deputy / LPA holder must have a scope of authority relevant to the issue at hand*
Key issues for practitioners
Best Interests Process

- It is the decision-maker’s responsibility to work out what would be in the best interests of the person who lacks capacity - MCA code of practice para 5.8 – 5.12.

*Balance sheet approach advocated by Courts.*

- If a Lasting Power of Attorney (or Enduring Power of Attorney) has been made and registered, or a deputy has been appointed under a court order, the attorney or deputy will be the decision-maker, for decisions within the scope of their authority - MCA code of Practice para 5.8.

- Where the decision involves the provision of medical treatment, the doctor or other member of healthcare staff responsible for carrying out the particular treatment or procedure is the decision-maker – MCA code of Practice para 5.8.

*Documentation is key*
Food for thought

• In emergency medical situations (for example, where a person collapses with a heart attack or for some unknown reason and is brought unconscious into a hospital), urgent decisions will have to be made and immediate action taken in the person’s best interests.

• In these situations, it may not be practical or appropriate to delay the treatment while trying to help the person make their own decisions, or to consult with any known attorneys or deputies. However, even in emergency situations, healthcare staff should try to communicate with the person and keep them informed of what is happening - Code para 3.6 see also s6(7)
Covert medication / Flu jab??

• Does the patient have treatment consenting capacity – if not------

• Best interests process –

Which amongst others should take into account views of:

- LPA, deputy, relatives, IMCA
- Pharmacist – medium of administration
- Doctors (GP, Psychiatrist where relevant)
- Nurses/care home staff

• Capacity assessment and best interests process should be well documented.
Key issues for clinicians’ documentation

• Important to keep comprehensive documentation as Mental capacity assessment can be challenged – code para 4.10

    See also D v R and S (2010) EWHC 2405 (COP) para 113

• The assessor must be able to provide objective evidence to support their belief about the individual’s capacity ie describe the steps they have taken – code para 4.44, para 4.63

• Assessments of capacity to take day-to-day decisions or consent to care require no formal assessment procedures or recorded documentation – code para 4.60

• But it is good practice for paid care workers to keep a record of the steps they take when caring for the person concerned
S 5 (1) allows for patients to be transported to hospital for treatment as long as:

• (i) P lacks capacity in relation to the matter, and
• (ii) that it will be in P’s best interests for the act to be done

S 5 does not authorise a person to do an act which conflicts with a decision made by –

• (a) a donee of a lasting power of attorney granted by the individual or
• (b) a deputy appointed for the individual by the court (as long as they are acting within their powers)
• Or conflict with an advance decision not to receive a certain treatment

(MCA code 6.37 and 6.38)

S5 MCA addresses acts in connection with care or treatment
Transporting patients under MCA

- In some cases, there may be no alternative but to move the person. Such a move would normally require the person’s formal consent if they had capacity to give, or refuse, it. In cases where a person lacks capacity to consent, section 5 of the Act allows carers to carry out actions relating to the move – as long as the Act’s principles and the requirements for working out best interests have been followed. This applies even if the person continues to object to the move – MCA Code of Practice para 6.11.

- For the purposes of this section the person doing the act restrains the patient if he—
  - (a) uses, or threatens to use, force to secure the doing of an act which the patient resists, or
  - (b) restricts the patient’s liberty of movement, whether or not the patient resists. MCA Section 6 (1-4)

- However, section 6 places clear limits on the use of force or restraint by only permitting restraint to be used (for example, to transport the person to their new home) where this is necessary to protect the person from harm and is a proportionate response to the risk of harm.
  (see paragraphs 6.40–6.53).

However actions causing Deprivation of liberty may require use of DoLS or an order from the Court of Protection MCA section 4a/4b
Transporting patients under MCA

• Transporting a person who lacks capacity from their home, or another location, to a hospital or care home will not usually amount to a deprivation of liberty (for example, to take them to hospital by ambulance in an emergency). Even where there is an expectation that the person will be deprived of liberty within the care home or hospital, it is unlikely that the journey itself will constitute a deprivation of liberty so that an authorisation is needed before the journey commences.

• In almost all cases, it is likely that a person can be lawfully taken to a hospital or a care home under the wider provisions of the Act, as long as it is considered that being in the hospital or care home will be in their best interests.

DoLS Code of Practice para 2.14, MCA code of practice para 6.9-6.11
Note:

- Section 135 and 136 of the MHA 1983 are the exclusive powers available to police officers to remove persons who appear to be **mentally disordered** to a place of safety.

- Sections 5 and 6 of the MCA 2005 do not confer on police officers authority to remove persons to hospital or other places of safety for the purpose set out in sections 135 and 136 of the MHA 1983.

Sessay v South London and Maudsley NHS and the commissioner of Police for the Metropolis [2011] EWHC 2617 (QB) para 4
Sometimes one person (must be over 18) will want to give another person authority to make a decision on their behalf. A power of attorney is a legal document that allows them to do so. Under a power of attorney, the chosen person (the attorney or donee) can make decisions that are as valid as one made by the person (the donor).

Note however that:

* LPAs cannot give attorneys the power to demand specific forms of medical treatment that healthcare staff do not believe are necessary or appropriate for the donor’s particular condition. MCA Code of Practice para 7.28

Where the decision involves the provision of medical treatment, the doctor or other member of healthcare staff responsible for carrying out the particular treatment or procedure is the decision-maker – MCA code of Practice para 5.8
The document (creating the Power of Attorney) must include a certificate completed by an independent third party, confirming that:

- in their opinion, the donor understands the LPA’s purpose
- nobody used fraud or undue pressure to trick or force the donor into making the LPA and
- there is nothing to stop the LPA being created – para 7.7 MCA Code of Practice

Note:

- Anything done under the authority of the LPA must be in the person’s best interests - MCA code para 7

And:

They must also respect any conditions or restrictions that the LPA document contains - MCA code para 7.18
When healthcare or social care staff are involved in preparing a care plan for someone who has appointed a personal welfare attorney, they must first assess whether the donor has capacity to agree to the care plan or to parts of it. **If the donor lacks capacity**, professionals **must** then consult the attorney and get their agreement to the care plan. They will also need to consult the attorney when considering what action is in the person’s best interests - Code of practice para 7.25

Anyone who doubts that the attorney is acting in the donor’s best interests can apply to the Court of Protection for a decision - MCA Code of Practice para 7.31
If the LPA is to be used:

- check whether the person has the capacity to make that particular decision for themselves. **If they do:**

  - a personal welfare LPA cannot be used – the person must make the decision.
  
  - a property and affairs LPA can be used even if the person has capacity to make the decision, unless they have stated in the LPA that they should make decisions for themselves when they have capacity to do so **MCA - Code of practice para 7**

- Ensure it is registered.

- Avail yourself of its content as donor might have set a variety of conditions and limits on the powers given to the attorney.
Personal Welfare

• LPAs can be used to appoint attorneys to make decisions about personal welfare, which can include healthcare and medical treatment decisions.

• The attorney(s) will only be able to act after the individual has lost mental capacity to make decision on the issue at hand.
Such decisions might include: (MCA code para 7.21)

- where the donor should live and who they should live with
- the donor’s day-to-day care, including diet and dress
- who the donor may have contact with
- consenting to or refusing medical examination and treatment on the donor’s behalf
- arrangements needed for the donor to be given medical, dental or optical treatment
- assessments for and provision of community care services
- whether the donor should take part in social activities, leisure activities, education or training
- the donor’s personal correspondence and papers
- rights of access to personal information about the donor, or
- complaints about the donor’s care or treatment
Relevant information - LPA

Property and Affairs

- A donor can make an LPA giving an attorney the right to make decisions about property and affairs (including financial matters). Unless the donor states otherwise, once the LPA is registered, the attorney is allowed to make all decisions about the donor’s property and affairs even if the donor still has capacity to make the decisions for themselves. In this situation, the LPA will continue to apply when the donor no longer has capacity - Code of practice para 7.32.

- If a donor does not restrict decisions the attorney can make, the attorney will be able to decide on any or all of the person’s property and financial affairs - Code of practice para 7.36.
This might include: (Code of practice 7.36)

- buying or selling property
- opening, closing or operating any bank, building society or other account
- giving access to the donor’s financial information
- claiming, receiving and using (on the donor’s behalf) all benefits, pensions, allowances and rebates (unless the Department for Work and Pensions has already appointed someone and everyone is happy for this to continue).
- receiving any income, inheritance or other entitlement on behalf of the donor
- dealing with the donor’s tax affairs
- paying the donor’s mortgage, rent and household expenses
- insuring, maintaining and repairing the donor’s property
- investing the donor’s savings
- paying for private medical care and residential care or nursing home fees
- applying for any entitlement to funding for NHS care, social care or adaptations
Health and Welfare (HWLPA) LPA vs Property and Affairs LPA

**Health & Welfare**

- HWLPA can **only** be granted to an **individual** (over 18) not a trust corporation - MCA s10(1)(a).

- A registered HWLPA can only be used if the donor does not have capacity to make the required health and welfare decision.

  MCA CODE Para 7.23

**Property & Affairs**

- Property and Affairs LPA can be a trust corporation.

- A registered property and Affairs LPA can take effect immediately and continue after the donor loses mental capacity to make relevant decisions.

  MCA code para 7.32-7.33
In the BMA’s view there is nothing to prevent doctors accepting requests from patients to act as health and welfare attorneys. Any such request should nevertheless be considered carefully as it may involve some risk of exposing health professionals to potential conflicts of interest. In particular doctors should avoid acting as attorneys where there are actual or perceived financial conflicts of interest. In addition, in the BMA’s view doctors acting as health and welfare attorneys should not be involved in the preliminary assessment of the patient’s capacity prior to the power being used.

Doctors acting as health and welfare attorneys for their patients – a guidance note February 2012
Advance decisions to refuse treatment:

“Advance decision” means a decision made by a person after he has reached 18 and when he has capacity to do so, that if—

- (a) at a later time and in such circumstances as he may specify, a specified treatment is proposed to be carried out or continued by a person providing health care for him, and
- (b) at that time he lacks capacity to consent to the carrying out or continuation of the treatment,
- the specified treatment is not to be carried out or continued

Section 24(1)MCA

Only applicable to life sustaining treatment if life is at risk if written and signed/witnessed - Section 25(5)

Does not apply to treatments carried out under MHA (MCA Code of Practice para 9) except those given under section 58A MHA eg ECT
Also:

A patient who dies as a result of the natural progression of their disease, following the *Capacitous refusal* of life-prolonging treatment, does not commit suicide - Airedale NHS Trust v Bland [1993] 1 All ER 821, Re JT (Adult: Refusal of medical treatment) [1998] 1 FLR 48 and Re AK (Medical treatment: Consent) [2001] 1 FLR 129
The court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court S 47(1).

The Court of Protection has powers to:

- decide whether a person has capacity to make a particular decision for themselves
- appoint deputies to make decisions for people lacking capacity to make those decisions
- decide whether an LPA or EPA is valid, and
- remove deputies or attorneys who fail to carry out their duties - MCA Code of Practice para 8
Where an individual lacks capacity in relation to a matter or matters concerning personal welfare, or property and affairs the CoP can make an order, make the decision or decisions on P's behalf in relation to the matter or matters s16(2)(a)
• Attorneys must always follow the Act’s principles and make decisions in the donor’s best interests. If healthcare staff disagree with the attorney’s assessment of best interests, they should discuss the case with other medical experts and/or get a formal second opinion. Then they should discuss the matter further with the attorney. If they cannot settle the disagreement, they can apply to the Court of Protection (see paragraphs 7.45–7.49 below). While the court is coming to a decision, healthcare staff can give life-sustaining treatment to prolong the donor’s life or stop their condition getting worse - MCA Code of Practice para 7.29.

• Anyone who doubts that the attorney is acting in the donor’s best interests can apply to the Court of Protection for a decision - MCA Code of Practice para 7.31
• You – MCA and You

• Your patient – MCA and your patient

• What Authority- consent, MCA, MHA, Common law?

• No decisions about you without you
• The MCA enshrines the rights of every citizen (over16) to exercise choice and to receive assistance to do so when their ability is limited: quite simply “No decision about me without me.”


• This means --- that “a person is presumed to have capacity in the relevant regard unless it is established that they do not and further that if they have capacity then they also have autonomy to make a decision which may be unwise or which others do not agree with”.

Holman J in Re SB [2013] EWHC 1417 (COP) paragraphs 9 and 10

Under the Act it is a criminal offence to wilfully neglect or ill treat an adult lacking mental capacity to make a required decision.
Section 44(2) MCA