Mental Capacity Act (MCA) 2005 – Impact on Children and Young Adults

A briefing for Parent Partnership Services – July 2012

The Mental Capacity Act (MCA) was enacted in 2005 and has been in force in England and Wales since 2007 when a Code of Practice was issued. The MCA’s purpose is to provide a statutory framework for people who lack capacity to make decisions for themselves, or who have capacity and want to make preparations for a time when they may lack capacity in the future. It sets out who can take decisions, in which situations, and how they should go about this.

This synopsis is based on the MCA Code of Practice and other relevant documentation and is aimed specifically at those providing services to young adults in transition aged 19+. Changes to the MCA may be implemented as a result of the Health and Social Care Act 2012.

NB throughout the MCA and MCA Code of Practice a person’s capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

The five key principles in the MCA are:

1. Every adult has the right to make his or her own decisions and must be assumed to have capacity to make them unless it is proved otherwise.

2. A person must be given all practicable help before anyone treats them as not being able to make their own decisions.

3. Just because an individual makes what might be seen as an unwise decision, they should not be treated as lacking capacity to make that decision.

4. Anything done or any decision made on behalf of a person who lacks capacity must be done in their best interests.

5. Anything done for or on behalf of a person who lacks capacity should be the least restrictive of their basic rights and freedoms.

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1 See also MCA Code of Practice 2007
2 There are a number of useful booklets provided by the Office of the Public Guardian (OPG)
What is capacity or lack of capacity?

Presuming someone has capacity

- The starting assumption must always be that a person has the capacity to make a decision, unless it can be established that they lack capacity.

Understanding what is meant by capacity and lack of capacity

- A person’s capacity must be assessed specifically in terms of their capacity to make a particular decision at the time it needs to be made.

Treating everyone equally

- A person’s capacity must not be judged simply on the basis of their age, appearance, condition or an aspect of their behaviour.

Supporting the person to make the decision for themselves

- It is important to take all possible steps to try to help people make a decision for themselves

Assessing capacity

Anyone assessing someone’s capacity to make a decision for themselves should use the two-stage test of capacity.

1. Does the person have an impairment of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works? (It doesn’t matter whether the impairment or disturbance is temporary or permanent.)

2. If so, does that impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made?

Assessing ability to make a decision

- Does the person have a general understanding of what decision they need to make and why they need to make it?

- Does the person have a general understanding of the likely consequences of making, or not making, this decision?

- Is the person able to understand, retain, use and weigh up the information relevant to this decision?

- Can the person communicate their decision (by talking, using sign language or any other means)? Would the services of a professional (such as a speech and language therapist) be helpful?
Assessing capacity to make more complex or serious decisions

- Is there a need for a more thorough assessment (perhaps by involving a doctor or other professional expert)?

What are children and young adults?

Within the MCA Code of Practice “children” are people below the age of 16; “young people” are those aged 16 and 17; anyone aged 18 and over is considered to be an “adult”. This differs from the law more generally and the Children Act 1989 in particular where the term “child” is used to refer to anyone under 18.

Does the MCA apply to children?

With two exceptions the MCA does not apply to children under 16. The exceptions are that:

1. The Court of Protection can make decisions about a child’s property and finances if the child lacks capacity to do so (under section 2(1) of the MCA) and is still likely to lack the capacity so to do when they reach 18 (section 18(3)).
2. Offences of ill-treatment or wilful neglect of a person who lacks capacity can also apply to victims younger than 16 (Section 44).

Does the MCA apply to young people?

Most of the Act applies to young people aged 16-17 years who may lack capacity under section 2(1) to make specific decisions, but there are three exceptions:

1. Only people aged 18 or over can make a Lasting Power of Attorney (LPA)
2. Only people aged 18 and over can make an advance decision to refuse medical treatment
3. The Court of Protection may only make a statutory will for a person aged 18 and over.

Helping someone to make a decision for themselves

To help someone make a decision for themselves, check the following points:

Providing relevant information

1. Does the person have all the relevant information they need to make a particular decision?
2. If they have a choice, have they been given information on all the alternatives?
Communicating in an appropriate way

1. Could information be explained or presented in a way that is easier for the person to understand (for example, by using simple language or visual aids)?
2. Have different methods of communication been explored if required, including non-verbal communication?
3. Could anyone else help with communication (for example, a family member, support worker, interpreter, speech and language therapist or advocate)?

Making the person feel at ease

1. Are there particular times of day when the person’s understanding is better?
2. Are there particular locations where they may feel more at ease?
3. Could the decision be put off to see whether the person can make the decision at a later time when circumstances are right for them?

Supporting the person

Can anyone else help or support the person to make choices or express a view?

Best Interests

The MCA sets out the principle that any decision made on behalf of someone who lacks the capacity to make a decision at a particular time should be made in the best interests of the individual. The term best interests is not defined by the Act as it is too broad a term with too many variables to be proscriptive about. However the Code of Practice sets out a checklist of things to be taken into account.

When working out what is in the best interests of the person who lacks capacity to make a decision or act for themselves, decision-makers must take into account all relevant factors that it would be reasonable to consider, not just those that they think are important. They must not act or make a decision based on what they would want to do if they were the person who lacked capacity.

What protection do people have when caring for those who lack capacity to consent?

On a daily basis in England and Wales millions of people carry out caring tasks for people who lack capacity to

- take decisions about their own care or treatment, or
- consent to someone else caring for them.
Such acts range from everyday tasks of caring (for example, helping someone to wash) to life-changing events (for example, serious medical treatment or arranging for someone to go into a care home).

In theory, many of these actions could be against the law. Legally, people have the right to stop others from interfering with their body or property unless they give permission. But what happens if someone lacks capacity to give permission? Carers who dress people who cannot dress themselves are potentially interfering with someone’s body without their consent, so could theoretically be prosecuted for assault.

Section 5 of the Act provides ‘protection from liability’. In other words, it protects people who carry out these actions. It stops them being prosecuted for acts that could otherwise be classed as civil wrongs or crimes. By protecting family and other carers from liability, the Act allows necessary caring acts or treatment to take place as if a person who lacks capacity to consent had consented to them. People providing care of this sort do not therefore need to get formal authority to act.

Importantly, section 5 does not give people caring for or treating someone the power to make any other decisions on behalf of those who lack capacity to make their own decisions. Instead, it offers protection from liability so that they can act in connection with the person’s care or treatment. The power to make decisions on behalf of someone who lacks capacity can be granted through other parts of the Act.

The Mental Capacity Act, Deprivation of Liberty safeguards (MCA DOLS)

The Mental Capacity Act Deprivation of Liberty safeguards (formerly known as the Bournewood safeguards) were introduced into the Mental Capacity Act 2005 through the Mental Health Act 2007 (which received Royal Assent in July 2007).

The MCA DOL safeguards apply to anyone:

- aged 18 and over
- who suffers from a mental disorder or disability of the mind – such as a profound learning disability
- who lacks the capacity to give informed consent to the arrangements made for their care and / or treatment and
- for whom deprivation of liberty (within the meaning of Article 5 of the ECHR)
- is considered after an independent assessment to be necessary in their best interests to protect them from harm.
The safeguards cover patients in hospitals, and people in care homes registered under the Care Standards Act 2000, whether placed under public or private arrangements.

The safeguards came in to force in April 2009 and are designed to protect the interests of an extremely vulnerable group of service users and to:

- ensure people can be given the care they need in the least restrictive regimes
- prevent arbitrary decisions that deprive vulnerable people of their liberty
- provide safeguards for vulnerable people
- provide them with rights of challenge against unlawful detention
- avoid unnecessary bureaucracy

**The use of restraint**

Sometimes it is necessary to physically restrain a person. The MCA allows physical restraint, but only if it is necessary to prevent the person coming to harm. For example, a carer may prevent someone from stepping out into the middle of a busy road, if they lack capacity to understand the danger posed by traffic.

However, any restraint has to be reasonable and in proportion to the potential harm. A carer might prevent someone from going out alone because they cannot cross roads safely, but it would be unreasonable for them to completely stop an individual from going outdoors to protect them from road traffic. If a person uses excessive restraint they could be liable to a range of civil and criminal penalties.

**Independent Mental Capacity Advocates**

The MCA also made provision for Independent Mental Capacity Advocates.

In some situations, and IMCA must be provided to someone, whether they have requested one or not. This is called, non-instructed advocacy. This would happen if:

- The person is aged 16 or over
- A decision needs to be made about either a long-term change in accommodation or serious medical treatment,
- The person lacks capacity to make that decision, and
- There is no one independent of services, such as a family member or friend, who is “appropriate to consult”.

In some cases, for example in Care Reviews and Adult Protection situations, an IMCA may also be provided. This is particularly true for Adult Protection cases, where an IMCA may be provided even if family and friends are there to consult with.

Contact details for local IMCAs can be found on the Department of Health website.

**Housing and the MCA**

The MCA provides a useful framework for working through some of the issues relating to a person with learning disabilities entering into a tenancy agreement and contains statutory guidance for people who lack capacity to enter into contracts for goods and services.

Housing Options have produced a useful Factsheet regarding the MCA. [http://www.housingoptions.org.uk/general_information/gi_factsheets/fs_22.pdf](http://www.housingoptions.org.uk/general_information/gi_factsheets/fs_22.pdf)

**How might the MCA impact on the work of PPS?**

If parents want the PPS to support them in making decisions about their child’s life and that child is over 16 the PPS need to keep in mind the MCA, advise the parent accordingly and ensure that the young person has access to suitable advice and/or advocacy.
Appendix 1 – relevant extracts from MCA2005 and related information from Human Rights Act 1998 (HRA)

MCA05 Part 1 Persons who lack capacity

2 People who lack capacity

(1) For the purposes of this Act, 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.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to—

   (a) a person’s age or appearance, or
   (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

(5) No power which a person ("D") may exercise under this Act—

   (a) in relation to a person who lacks capacity, or
   (b) where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16.

(6) Subsection (5) is subject to section 18(3).

3 Inability to make decisions

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

   (a) to understand the information relevant to the decision,
   (b) to retain that information,
   (c) to use or weigh that information as part of the process of making the decision, or
(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

(a) deciding one way or another, or

(b) failing to make the decision.

4 Best interests

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—

(a) the person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable—
(a) the person’s past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

as to what would be in the person’s best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—

(a) are exercisable under a lasting power of attorney, or

(b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

(10) “Life-sustaining treatment” means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.

(11) “Relevant circumstances” are those—

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.

Chapter 9, Part 1

44 Ill-treatment or neglect

(1) Subsection (2) applies if a person ("D")—
(a) has the care of a person ("P") who lacks, or whom D reasonably believes to lack, capacity,

(b) is the donee of a lasting power of attorney, or an enduring power of attorney (within the meaning of Schedule 4), created by P, or

(c) is a deputy appointed by the court for P.

(2) D is guilty of an offence if he ill-treats or wilfully neglects P.

(3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine or both.

**Human Rights Act 1998 - Article 5**

**RIGHT TO LIBERTY AND SECURITY**

1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3 Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.