The Mental Capacity Act 2005 in England and Wales

Adults who lack capacity to make decisions for themselves are some of the most vulnerable members of our society. The Mental Capacity Act 2005 (MCA) was designed to both empower these adults to be supported to make their own decisions and protect them where necessary. The MCA protects the human rights of people who may lack capacity to make decisions for themselves. Adults whose capacity is impaired have the right to make unwise decisions under the MCA.

The five key principles of the MCA

1. Capacity must always be assumed - this means at the outset you should presume the person can make their own decisions
2. The person must be supported to make their own decision - this may mean involving people who maybe able to help such as learning disability nurses, occupational therapists or speech and language therapists who can help with understanding and communication. Attorneys maybe able to support the donee in decision making and should be encouraged to do so. Simple measures such as making sure the person has their glasses and hearing aid maybe relevant.
3. Allow for the unwise decision, just because a patient makes a decision that you view as being unreasonable does not mean that they have not got the capacity to do so.
4. Any decision made under the MCA has to be in the patients best interests, taking into account previous wishes and feelings and opinions of those close to them.
5. Any decision made must be the least restrictive option available to the person. This may mean trying to keep someone in their own home as long as possible with support, or if they need restraint that this is the least restrictive type available.

Assessing Capacity

In order to use the MCA the person needing to make the decision must have an impairment of the mind or brain and the lack of capacity must relate to this condition. Capacity is decision and time specific, so when doing a capacity assessment have clear in your head what the decision to be made is. You will need to know what benefits the treatment or intervention will bring to the patient and what negative effects their maybe. The capacity assessment then revolves around you explaining these to the patient, and then taking the following factors into consideration-
The patient needs to be able to communicate with you in some form although this need not be the spoken word. They need to understand the issue, and they need to be able to show evidence that they can balance the good and bad points about what they are being offered. Do not set the bar for understanding too high, remember the patient is not a professional.

The patient needs to retain the information, briefly is acceptable.

Recording capacity assessments is a mandatory part of good practice.

The Social Care Institute of Excellence (SCIE) website hosts a variety of Manetal Capacity tools and resources here. These include a Mental Capacity Assessment form on which capacity assessments could be recorded. Free text notes are adequate providing you cover all aspects of the Act.

Further reading on performing capacity assessments can be found here.

**Best Interest Decisions**

Normally ‘the decision maker’ will decide what is in the patients best interest. The decision maker is usually the person performing the act. So a GP would assess capacity for medical procedures, and a nurse would make a decision about changing dressings for example. People who know the person who lacks capacity well such as family and close friends should be consulted. If someone without capacity has a legally appointed representative for health and welfare, such as an attorney or court appointed deputy, this person should have the opportunity to be involved in best interest decisions. Long term carers can be a valuable resource. The patients prior wishes and feelings should be discussed with particular value being placed on religious and cultural attitudes. A best interest meeting is not mandatory, as long as you have consulted appropriate sources for information.

This link provides further reading on making best interest assessments.

**Lasting Power of Attorney for Health and Welfare**

Any patients with capacity over 18 years of age can nominate one or more adults to act for them once they have lost the capacity to make decisions for themselves although remember capacity is time and decision specific. These nominated people are know as attorneys. They would need to complete a ‘lasting power of attorney form’ in order to legally appoint someone. An attorney for health and welfare makes decisions as if they were the patient themselves. When health professionals are making a care plan for the person lacking capacity that the LPA refers to they must consult the attorney to make sure they agree with it. No best interest process is needed. The donor (the person who the LPA concerns), can choose whether the attorney is able to make decisions about life sustaining treatment. The LPA will need to be carefully checked to see what decisions the attorney can make. The LPA has to be registered with the Office of the Public Guardian (OPG).
The Court of Protection may also appoint a person to be the health and welfare deputy for someone without mental capacity where no LPA has been set up. This is a similar role to an attorney, the difference being that the Court made the appointment. An example of a Court Order appointing a deputy can be found here.

If attorneys are not acting in the best interest of the patient this can be reported to the OPG. The OPG will investigate the case and take it to the Court of Protection if it is felt that the attorney is not acting appropriately. Details can be found here.

GPs need to check that the paperwork for an LPA is registered with the OPG and if in any doubt contact the OPG themselves. An example of a properly registered LPA for Health and Welfare can be found here.

Do not confuse LPA’s for Health and Welfare with those for Property and Affairs. An attorney can only make decisions about the type of LPA they have, although an attorney for Property and Affairs could be asked to contribute to a best interest process regarding the donee’s health.

A property and affairs attorney may ask for, or consent to, access to medical records in relation to a financial decision they need to make on behalf of the donor – for example when arranging health insurance.

**Advance Decision To Refuse Treatment (ADRT)**

These documents are written when a patient aged 18 years or over has the capacity to do so and can specify what treatment in the future they do not want. This can include for instance not wanting to be ventilated or artificially fed. The patient cannot ask for treatment, only refuse treatment. This could constitute part of advance care planning for patients with long term conditions where it can be anticipated that they may lose capacity. A doctor needs to check that an ADRT is valid and applicable before they withhold treatment. An ADRT that a patient has made verbally and the doctor has recorded in the notes would not cover life sustaining treatment, these always have to be in writing, signed by the patient and witnessed by someone 18 years or over. The SCIE website hosts a variety of resources covering ADRT here. The resources include guidance for helping a patient write an Advance Decision to Refuse Treatment as described in the MCA 2005. These can be done by doctors without involving a solicitor.

**Independent Mental Capacity Advocate (IMCA)**

IMCAs are people trained to represent adults who lack capacity to make decisions for themselves. Local policies will vary as to how they are appointed, your local safeguarding team will usually offer advice. They can be used when a person lacking capacity is ‘unbefriended’, which means they have no one to represent their views during the best interest process. IMCAs are also used if a Section 42 enquiry under the Care Act 2014 (in Wales the Social Services and Well-Being Act) is undertaken, this means that the person lacking capacity has experienced serious harm as a result of abuse.
Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards (DoLS) are an amendment to the Mental Capacity Act which allows restraint and restrictions to be used but only if they are in the persons best interests. These are designed to safeguard adults who lack capacity to make the decision as to where their care and treatment should take place. Any person wishing to restrain a person who lacks the mental capacity to consent to this must apply to their local authority for a DoLS order. This affects for example people with dementia in care homes.

Further information about DoLS can be found in this Age UK factsheet.

General MCA resources

The National Mental Capacity Forum chaired by Baroness Finlay brings together all of the different strands of the NHS to provide a united front in promoting the MCA 2005. The Social Care Institute for Excellence (SCIE) website has a large number of resources about all aspects of the MCA.

MCA Code of Practice.

BMA quick guide to the MCA.

The Mental welfare Commission for Scotland good practice guide Supported Decision Making has been written for use in Scotland but gives very practical advice about how to help people maximise their capacity to make decisions for themselves.