The Mental Capacity Act 2005

November 2021 Why should we use it? What difference does it make?

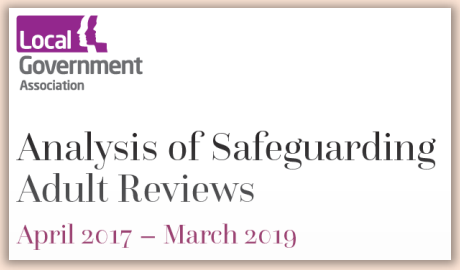
1. Consent and the MCA are linked

NHS guidance: ***'For consent to be valid, it must be voluntary and informed, and the person consenting must have the capacity to make the decision****. The meaning of these terms are:*

- ***voluntary*** *– the decision to either consent or not to consent to treatment must be made by the person, and must not be influenced by pressure from medical staff, friends or family*
- ***informed*** *– the person must be given all of the information about what the treatment involves, including the benefits and risks, whether there are reasonable alternative treatments, and what will happen if treatment does not go ahead*
- ***capacity*** *– the person must be capable of giving consent, which means they understand the information given to them and can use it to make an informed decision'*

'If an adult has the capacity to make a voluntary and informed decision to consent to or refuse a particular treatment, their decision must be respected.' https://www.nhs.uk/conditions/consent-to-treatment/

2. We want to safeguard adults (and save lives)



December 2020: The first national review of SARs analysing 231 SARs involving the deaths of 188 people. The SARs cover all types of care providers and professional groups (ambulance staff, police, nurses, doctors, social workers etc)

'For direct practice, attention to mental capacity was the most prevalent theme. The majority of the observations in this theme were related to poor practice...'

'Failure to assess: *There were numerous mentions of failure to assess mental capacity when to do so was warranted.'*

www.local.gov.uk/analysis-safeguarding-adult-reviews

National Institute of Health Research and Kings College London
8 September 2021: 77 SARs from across London analysed involving the deaths of 45 people.

'...there are two major problem areas across virtually all the cases and clusters – professional knowledge and usage of the ***Mental Capacity Act 2005*** *and inter-agency working and communication.'*

'We uncovered that in ***most SARs mental capacity legal processes were not used at all*** *or appropriately..'*

https://kclpure.kcl.ac.uk/portal/files/159522290/Green_et_al._2021_SARs_and_mental_health_social_care_in_London.pdf

3. Coroner's reports (save more lives)

5 May 2021: Laura Booth, Coroner's report (prevention of future deaths)

Laura Booth died aged 21 whilst a patient at the Royal Hallamshire Hospital. She had a learning disability and was in hospital for a routine eye operation. The coroner found she: *'...developed* ***malnutrition*** *due to inadequate management of her nutritional needs. Her death was* ***contributed to by neglect****.'* Matters of concern raised by the coroner included:

- *'I remain* ***gravely concerned that Senior Clinicians have limited or no understanding of the Mental Capacity Act*** *and apply it in a way which undermines the principles and requirements of the legislation.'*

https://www.judiciary.uk/publications/laura-booth/

16 September 2021: Irene Esaw, Coroner's report (prevention of future deaths)

Irene Esaw was 73 years old and had dementia when she died at home after being discharged from Tameside General Hospital. The matters of concern raised by the coroner included: *'...there was a* ***fundamental failure*** *by the clinical and nursing staff to adequately consider and* ***assess Mrs. Esaw's capacity to make decisions about her own care needs*** *whilst she was a patient at Tameside General Hospital between 12th and 28th September 2018. This failure in my view, undermined her discharge planning and was* ***one of the key reasons why the discharge was unsafe****.'*

From the authors of: *Working with the Working with the Mental Capacity Act (3rd edition) S. Richards & AF. Mughal*

https://www.judiciary.uk/publications/irene-esaw-prevention-of-future-deaths-report/

4 October 2021: Jude Daryl Lloyd, Coroner's report (prevention of future deaths)
Jude Daryl Lloyd had chronic schizo-affective disorder and diabetes. He was admitted to a mental health NHS Trust and detained under Section 3 of the Mental Health Act. The Coroner found he died of *'Natural Causes* ***contributed to by Neglect'*** and identified the following concern: *'During the course of the admission he refused to take his diabetic medication or agree to blood sugar testing. He denied having Diabetes or mental health problems...****No formal mental capacity assessment was undertaken or recorded****.'* He died of diabetic ketoacidosis at home after his discharge.
https://www.judiciary.uk/publications/jude-lloyd-prevention-of-future-deaths-report/

4. We want to save lives (save even more lives)

The Learning Disabilities Mortality Review (LeDeR) Programme

NHS

NHS England and NHS Improvement

July 2020: Action Learning Report 2019/2020 for the Learning Disabilities Mortality Review (LeDeR) programme

'A consistent theme emerging from reviews is ***the need for more understanding of, and adherence to the Mental Capacity Act*** *(MCA) 2005 across both health and social care.'* www.england.nhs.uk/publication/leder-action-from-learning-report/

5. We want to act legally (and not be taken to court)

Court of Appeal – Master of the Rolls, Lord Dyson:
'As I have said, the Mental Capacity Act does not impose impossible demands on those who do acts in connection with the care or treatment of others. ***It requires no more than what is reasonable, practicable and appropriate.****'*

The failure of police officers to use the Mental Capacity Act when dealing with a man with autism in a public swimming pool. The Court of Appeal agreed with the lower judge that the officers were liable for trespass to the person, assault, battery and false imprisonment. Case of: ZH v Commissioner of Police for the Metropolis [2013] EWCA Civ 69
https://www.bailii.org/ew/cases/EWCA/Civ/2013/69.html

6. We want to meet CQC standards of care

CareQuality Commission

Regulation 11: Need for consent

Providers must have regard to the following guidance: *'Where a person lacks mental capacity to make an informed decision, or give consent, staff* ***must*** *act in accordance with the requirements of the Mental Capacity Act 2005 and associated code of practice.'*

Note: This regulation applies to **all** CQC registered care providers. www.cqc.org.uk/regulations-11-need-consent

Inadequate **Weston General Hospital, November 2021, Inadequate rating**

CQC inspectors found: *'Staff were not assessing patient's mental capacity to make decisions about medicines. For example, we saw that routine medicines for patients living with dementia were not given and the reason recorded as 'patient refused'. There was no assessment to determine if patients had the mental capacity to make that decision..'*
https://www.cqc.org.uk/location/RA7C2/reports

7. We want to meet our professional standards of practice

Nursing & Midwifery Council: The Code: Professional standards of practice and behaviour for nurses and midwives
'4.2 make sure that you get ***properly informed consent*** *and document it before carrying out any action'*
'4.3 keep to all relevant ***laws about mental capacity that apply*** *in the country in which you are practising'*

General Medical Council: Good medical practice
17. 'You must be satisfied that you have ***consent or other valid authority**** *before you carry out any examination or investigation, provide treatment or involve patients or volunteers in teaching or research.'*

Health & Care Professions Council: Standards of conduct, performance and ethics
1.4 *'You must make sure that you have* ***consent from service users or other appropriate authority**** *before you provide care, treatment or other services.'*

* *Other authority* when a person is unable consent = the MCA (assessment of mental capacity and best interests)

From the authors of: *Working with the Working with the Mental Capacity Act (3rd edition) S. Richards & AF. Mughal*