

## The Mental Capacity Act & Human Rights

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### MCA and Adult Welfare - Overview

- The legislation
- Resolving disputes about capacity
- Examples of welfare disputes
- Practical steps

### MCA – The Statutory Principles

- Person must be assumed to have capacity unless established that lacks capacity.
- Person not to be treated as unable to make a decision unless all practicable steps have been taken to help to do so.
- Person not to be treated as unable to make a decision merely because makes unwise decision.
- Act done under MCA for or on behalf of person who lacks capacity must be done in best interests.
- Can purpose be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action?

### MCA and Capacity

- Sections 2 & 3 MCA define what is meant by lack of capacity.
- Section 2:  
*“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 of, the mind or brain”*
- No universal test and there is a different test for different purposes.
- Section 3:  
A person is unable to make a decision for himself if he is unable to:-
  - Understand the information relevant to the decision.
  - Retain that information.
  - Use and weigh that information as part of the process of making the decision-making.
  - To communicate his decision (whether by talking, using sign language or any other means).

### MCA and Best Interests

- The term 'best interests' is not defined by the MCA.
- S.4 MCA however provides a non-exhaustive checklist of matters which should be taken into account:-
  - The person's past and present wishes and feelings (including any written statement made when had capacity)
  - The beliefs and values that likely to have if had capacity
  - Factors would consider "if able to do so"
  - Views of others, including, if appropriate, anyone caring for the person or interested in their welfare, any Attorney or Deputy

### Resolving Disputes About Capacity

- What if issue of capacity is not clear?
- For example, different professionals have different views?
- Or if P is asserting own capacity?
- In case of dispute, can be referred to the Court of Protection (CoP) to make a declaration on the issue of capacity.

### Resolving Disputes About Capacity

- MCA recognises that full evidence on capacity might not be available at early stage of proceedings.
- S.48 MCA says CoP can make interim orders/directions if “there is reason to believe that P lacks capacity in relation to the matter”.
- In case of Re F, judge said: “What is required, in my judgment, is simply sufficient evidence to justify a reasonable belief that P may lack capacity in the relevant regard ... the concept ... is really quite easily recognised”.

### Resolving Welfare Disputes

- If P lacks capacity, CoP can make orders and/or declarations in P's best interests.
- CoP is one of the tools for safeguarding vulnerable adults
- CoP's safeguarding powers are wide and can include:
  - Serious medical treatment, including life and death cases
  - Disputes about social care
  - Disputes about residence, including deprivation of liberty
  - Disputes about contact with others
  - Marriage and sexual contact – though CoP will only rule on capacity, not what is in P's best interests

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### Welfare Disputes - Examples

- Article 2 of the European Convention on Human Rights (ECHR) relates to individual's right to life. For example P in hospital in a coma or persistent vegetative state, receiving artificial nutrition and hydration ("ANH").
- Clinicians believe treatment is futile and would be in P's best interests to withdraw ANH.
- Family does not agree with decision to withdraw ANH.
- If hospital wishes to follow proposed course, must apply to CoP for order that this is in P's best interests

### Welfare Disputes - Examples

- Article 8 of the ECHR relates to respect for private and family life. For example P is 25-year-old woman with brain disease. Is pregnant and family believes is in her best interests to have termination.
- Doctors concerned that P cannot consent to the procedure.
- Hospital applies to CoP seeking declarations on P's capacity and best interests.
- CoP hears expert evidence and makes declarations on P's capacity and best interests.

### Welfare Disputes - Examples

- Another Article 8 example: P is 45-year-old man with learning disabilities, lives at home with his mother.
- Social services become concerned that mother no longer able to cope due to age and frailty. Propose that P should move into local authority accommodation.
- Mother does not recognise difficulties and does not agree to proposal. Local authority must therefore apply to the CoP seeking orders authorising move and any potential deprivation of liberty.

### Welfare Disputes - Examples

- And finally: P is 25-year-old man with learning disabilities. Lives at home with mother and father.
- P heard to say parents plan to take him abroad to get married.
- Local authority concerned that P lacks capacity to marry and not in his best interests to travel abroad.
- LA applies to CoP for declaration that P lacks capacity to marry and order forbidding parents from removing P from jurisdiction.

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### Welfare & PI – Practical Steps

- Who should make the application to the CoP?
- The CoP will usually expect the relevant statutory body to apply.
- In most cases this will be the local authority, but where the issues are purely medical, the NHS Trust should apply.
- However, it can be difficult to persuade statutory bodies to apply, particularly when they are not currently involved because care package funded through damages.

### Welfare & PI – Practical Steps

- If local authority / NHS Trust refuse to apply, others can apply instead:-
  - If a financial Deputy has been appointed, can apply to the CoP seeking declarations as to P's best interests
  - Family members and others involved in P's care
  - Independent Mental Capacity Advocate (IMCA)
  - In urgent cases, application can be made in P's own name with a litigation friend

### Welfare & PI – Practical Steps

- Public funding (“legal aid”) available in CoP welfare cases.
- If damages held in trust and P in receipt of state benefits, P might still qualify for legal aid.
- Family members may qualify in their own right for legal aid.
- If IMCA / other litigation friend applying, legal aid is in P’s name

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### MCA & Welfare - Summary

- CoP can resolve disputes about capacity or welfare
- CoP has broad welfare jurisdiction, including disputes about medical treatment, residence, care and contact.
- Applications can be brought by local authorities, NHS Trusts, Financial Deputies, family/carers, or in P's own name.
- CoP will make orders in P's best interests to safeguard P's welfare.