Mental Capacity Act

Aims: To give an overview of the Mental Capacity Act (2005) (MCA) and the implications to consenting to dental treatment.

Learning Outcomes: On completion of this verifiable CPD article, the participant will be able to demonstrate, through completion of a questionnaire, the ability to:

- Demonstrate knowledge of the Mental Capacity Act (2005), The Adults with Incapacity (Scotland) Act 2000 and the Mental Capacity Act (Northern Ireland) 2016.
- Identify who the MCA is designed to protect.
- Identify the five principles of the MCA.
- Know the two-stage test of capacity.
- Understand CQC Regulation 11: Need for Consent.
- Know the GDC standards relating to the patient's ability to consent to treatment.
- Know the principles of restrain.t
- Demonstrate knowledge of things to consider when deciding what is in an individual's best interests.
- Understand Gillick Competence.

Introduction

The Mental Capacity Act (2005) came into force in 2007 and is designed to protect and empower individuals who may lack the mental capacity to make their own decisions about their own care and treatment. It is a law that applies to individuals aged 16 and over.[1] Everyone involved in the care, treatment and support of people aged 16 and over in England and Wales, must comply with the Act when making decisions or acting for that person, when the person lacks capacity to make a particular decision for themselves. In Scotland, the relevant legislation is the Adults with Incapacity (Scotland) Act 2000. In Northern Ireland the appropriate legislation is the Mental Capacity Act (Northern Ireland) 2016.

The Mental Capacity Act

The same rules apply whether the decisions are life changing events or everyday matters.

Examples of people who may lack capacity include people with:

- Dementia
- A severe learning disability
- A brain injury
- A mental health condition
- A stroke
- Unconsciousness caused by an anaesthetic or sudden accident[1]

However, just because a patient has one of the above health conditions, it should not be assumed that they do not have the capacity to make a specific decision.[1]

Knowledge and understanding of the Mental Capacity Act (MCA) and the Mental Capacity Act Code of Practice is vital in dentistry if we are to protect our patients' best interests and gain consent for treatment. The law on consent in the UK states that three factors must be met for consent to be valid:

- Consent must be informed,
- Voluntary, and;
- The individual to whom the consent relates must be competent to consent for themselves (i.e., retain capacity).

By voluntary, it is meant that the consent is given without manipulation or coercion and the patient's dignity through autonomy is respected. As well as giving consent, patients have the right to refuse treatment if they have the capacity to do so.

Assessing capacity is governed by the MCA. Capacity is decision specific (i.e. not an 'all or nothing' state); patients with 'impaired' capacity may be competent to consent for one procedure (i.e. an examination) and not others (i.e. implant surgery), as some decisions are more complex or have a higher level of risk or permanence than others. Capacity is also a dynamic process, varying between times, such that patients may be able to give consent at one appointment, but not at another. Therefore, consent is an ongoing, dynamic process and consent forms, and records of such, should always reflect this.[2]

Dental professionals, like all other health professionals who routinely treat adults who lack mental capacity, or those with declining mental functioning, will be governed by the MCA and will need to be familiar with it and its Code of Practice. The Code of Practice explains how the Act operates day-to-day and offers examples of best practice to carers and practitioners. A failure to comply with the provisions of the Act

may lead to legal liability and a failure 'to have regard to' the Code may be used as evidence in any subsequent legal proceedings.[3]

The MCA will affect how and when we may treat a range of people who suffer incapacity due to dementia, learning disabilities, depression, brain injury and other forms of mental disorder and for whom treatment, welfare and financial decisions need to be made. It seeks to assist those who lack capacity to make their own independent decisions whilst recognising that they may be vulnerable to abuse and require protection.[3]

The Care Quality Commission (CQC)

Health and Social Care Act 2008 (Regulated Activities) Regulations 2014:

Regulation 11: Need for consent

The CQC state that: “The intention of this regulation is to make sure that all people using the service, and those lawfully acting on their behalf, have given consent before any care or treatment is provided. Providers must make sure that they obtain the consent lawfully and that the person who obtains the consent has the necessary knowledge and understanding of the care and/or treatment that they are asking consent for.” They state that “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.”[4]

Between 2023 and 2024, the CQC transitioned from using Key Lines of Enquiry (KLOEs) to a Single Assessment Framework (SAF) to streamline and enhance the evaluation of health and social care services in England.

THE SAF replaces the previous KLOEs and prompts with 34 quality statements known as ‘we statements’, articulated by the providers perspective. These statements define the expected standards of care and are organised under the existing five key questions:

1) Safe
2) Effective
3) Caring
4) Responsive
5) Well led

To assess compliance with quality statements, the CQC evaluates evidence across six categories:

1) People's experiences
2) Feedback from staff and leaders
3) Feedback from partners
4) Observation
5) Processes
6) Outcomes

The CQC expect dental staff to have knowledge of the Mental Capacity Act and other relevant legislation and how to apply it to practice. This applies to the question "is the service effective."

The General Dental Council

General Dental Council | protecting patients, regulating the dental team

The GDC Standards for the Dental Team Standard 1 is to "*put patients' interests first*." The GDC state that, as registered dental professionals:

"You must take a holistic and preventative approach to patient care which is appropriate to the individual patient.

1.4.1 A holistic approach means you must take account of patients' overall health, their psychological and social needs, their long-term oral health needs and their desired outcomes.

1.4.2 You must provide patients with treatment that is in their best interests, providing appropriate oral health advice and following clinical guidelines relevant to their situation. You may need to balance their oral health needs with their desired outcomes. If their desired outcome is not achievable or is not in the best interests of their oral health, you must explain the risks, benefits, and likely outcomes to help them to make a decision."

The GDC Standards for the Dental Team Standard 3 is to "*obtain valid consent*". The GDC state that, as registered dental professionals:

3.2 You must make sure that patients (or their representatives) understand the decisions they are being asked to make.

3.2.1 You must provide patients with sufficient information and give them a reasonable amount of time to consider that information in order to make a decision.

3.2.2 You must tailor the way you obtain consent to each patient's needs. You should help them to make informed decisions about their care by giving them information in a format they can easily understand.

3.2.3 When obtaining consent, you should encourage patients who have communication difficulties to have a friend, relative or carer with them to help them ask questions or understand your answers.

3.2.4 You must always consider whether patients are able to make decisions about their care themselves and avoid making assumptions about a patient's ability to give consent.

The General Dental Council acknowledge that this is a complex area, and you should refer to the appropriate legislation. In addition, your defence union can be contacted for advice.[6]

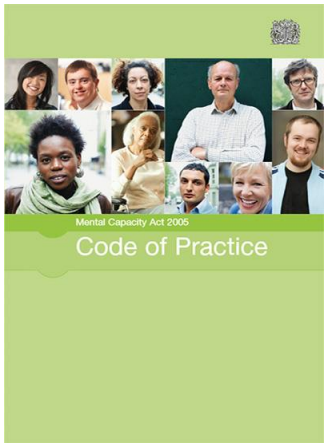
Principles of the Mental Capacity Act

The Act sets out the five 'statutory principles' – the values that underpin the legal requirements in the Act. The Act is intended to be enabling and supportive of people who lack capacity, not restricting or controlling of their lives. It aims to protect people who lack capacity to make particular decisions, but also to maximise their ability to make decisions, or to participate in decision-making, as far as they are able to do so.[7]

- ✓ **Principle 1. - A presumption of Capacity** - every adult has the right to make his/her own decisions and must be assumed to have capacity to do so unless it is proved otherwise.
- ✓ **Principle 2. - Individuals being supported to make their own decisions** - people must be given all appropriate help before anyone concludes that they cannot make their own decisions.
- ✓ **Principle 3. - Unwise decisions** - People have the right to make decisions that others might regards as being unwise or eccentric and a person cannot be treated as lacking capacity for these reasons.
- ✓ **Principle 4. - Best interests** - any decisions made, or anything done for or on behalf of a person who lacks capacity must be done in their best interests.

- ✓ **Principle 5.** - **Least restrictive alternative** - anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

How is Mental Capacity Determined?



The MCA is supported by practical guidance known as the "Code of Practice". The Code of Practice sets out a two-stage test of capacity:

1) Does the individual concerned have an impairment of, or a disturbance in the functioning of, their mind or brain, whether as a result of a condition, illness, or external factors such as alcohol or drug use?

2) Does the impairment or disturbance mean the individual is unable to make a specific decision when they need to? [7]

Individuals can lack capacity to make some decisions but have capacity to make others, so it is vital to consider whether the individual lacks capacity to make the specific decision.

Capacity can fluctuate with time - an individual may lack capacity at one point in time but may be able to make the same decision at a later point in time. Where appropriate, individuals should be allowed the time to make a decision themselves.

An example of this would be a patient with dementia who may have more mental clarity early in the day, so appointment times should be tailored to accommodate this factor. Or they may arrive at the practice and a carer could state that they are having a particularly poor day and, in this case, it may be appropriate to rearrange the appointment.

Dental professionals should also take into consideration how to communicate with the patient. For example, could the information be presented in a different way so that the patient can understand? For example, by using visual aids or other methods of nonverbal communication.

The Act states that a person is not able to make a decision in relation to a particular matter if they are unable to:

- Understand the information relevant to the decision or:
- Retain the information.
- Use or weigh up the information as part of the process of making the decision.
- Communicate their decision either by using speech, sign language, eye blinking, pointing or any other means including squeezing of hands.

Best Interests – Decisions

If someone is found to lack the capacity to make a decision, and such a decision needs to be made for them, the MCA states the decision must be made in their best interests. People who make decisions for individuals who lack capacity are called “decision makers”.

The MCA sets out a checklist of things to consider when deciding what's in an individual's best interests. It says you should:

- Encourage participation – do whatever is possible to permit or encourage the person to take part in making the decision. This will involve taking time and tailoring how you give the patient information to the individual’s needs.
- Identify all relevant circumstances – try to identify the things that are important to the person if they were making the decision themselves.
- Find out the person's views – including their past and present wishes and feelings, and any beliefs or values. With regard to dental treatment, examine the person’s previous history of dental treatment that they have consented to in the past.
- Avoid discrimination – do not make assumptions about the person's best interests on the basis of age, appearance, condition or behaviour.
- Assess whether the individual might regain capacity – if they might, could the decision/treatment be postponed? [7]

Consulting with others is a vital part of best interest decision-making. However, consideration needs to be given to:

- Data Protection Act 2018
- Confidentiality policy
- Human Rights Act 1998
- Equality and Diversity Act 2010
- Professional codes of conduct

People who should be consulted include anyone previously named by the person concerned, anyone engaged in caring for them, close relatives, friends or others who take an interest in their welfare, any attorney appointed under a Lasting Power of Attorney or Enduring Power of Attorney, and any deputy appointed by the Court of Protection to make decisions for the person.[8]

Always remember that good record keeping is required. This will include details of the two-stage capacity assessment. Why, when, and how best decisions were made and who was involved in the process.

Power of Attorney

A Lasting power of attorney (LPA) is a legal document which appoints someone to make decisions on the behalf of someone else. There are two types:

1) **Health and Personal Welfare for England, Scotland, and Wales (called a Welfare Power of Attorney in Scotland)-** decisions about whether to receive healthcare or stop a healthcare treatment, moving into a nursing home, where to live. This can only be used when the person is unable to make their own decisions at that particular time.
2) **Property and Financial Affairs -** paying bills, collecting benefits, selling a home affairs. This LPA can be used as soon as it is registered with the person's permission.[7]

A person may have one or both types of LPA. The following factors should be considered:

- ✓ The person must have capacity when they make their LPA.
- ✓ Next of kin do not automatically have the right to make treatment decisions and hired carers almost certainly do not.
- ✓ LPA cannot override the patient's decision if they are felt to be competent at the point of decision.
- ✓ Even if there is an LPA, always follow the Five Principles of the MCA.

Independent Mental Capacity Advocate

The Mental Capacity Act 2005 introduced the role of the Independent Mental Capacity Advocate (IMCA).

IMCAs are a legal safeguard for people who lack the capacity to make specific important decisions: including making decisions about where they live and about serious medical treatment options. IMCAs are mainly instructed to represent people where there is no one independent of services, such as a family member or friend, who is able to represent the person.[9]

Restraint

It is possible that CQC inspectors may ask dental staff about their Restraint Policy. Dental staff should understand the circumstances in which restraint can and cannot be used. When restraint is used, there should be a process to follow that is safe, lawful and not excessive. The Act requires that the following two conditions are met:

1) The person taking action must reasonably believe that restraint is necessary to prevent harm to the person who lacks capacity, and

2) The amount or type of restraint used and the amount of time it lasts must be a proportionate response to the likelihood and seriousness of harm.[7]

Consent for Children

The ability for children under 16 to give valid consent will depend on their maturity and ability to understand what the treatment involves. In England and Wales, this is referred to as being Gillick competent. Other guidelines that exist are 'Fraser guidelines' and these specifically relate only to contraception and sexual health.

To be Gillick competent, a child must:

- Understand the nature of the proposed treatment, its consequences and the alternatives, including no treatment.
- Retain that information.
- Use or weigh up that information in making a decision.
- Communicate that decision.[10]

Parental responsibility

If a child is not Gillick competent, authority to treat or share information may be given by someone with parental responsibility under the Children Act 1989. A mother automatically has parental responsibility for her child from birth. A father usually has parental responsibility if he is either:

- Married to the child's mother.
- Listed on the birth certificate (after a certain date, depending on which part of the UK the child was born in).

You can apply for parental responsibility if you do not automatically have it.[11]

Liberty Protection Safeguards

The Liberty Protection Safeguards will "provide protection for people aged 16 and above who are or who need to be deprived of their liberty in order to enable their care or treatment and lack the mental capacity to consent to their arrangements."[12]

People who may have a Liberty Protection Safeguards authorisation include those with dementia, autism and learning disabilities who lack the relevant capacity.

The Liberty Protection Safeguards were introduced in the Mental Capacity (Amendment) Act 2019 and will replace the Deprivation of Liberty Safeguards (DoLS) system. They were planned to come into force in April 2022, however, there has been a delay in the consultation which has led to delays in implementation. On 5th April 2023 the Department of Health and Social Care announced that the implementation of the Liberty Protection Safeguards (LPS), the Mental Capacity (Amendment) Act 2019, will be delayed "beyond the life of this Parliament" [13] No date for the implementation has been announced. Until LPS is fully implemented the current process remains.

Practice Considerations

The practice should have a copy of the Mental Capacity Act and ensure that everyone understands the five principles of the Mental Capacity Act and the two-stage test of capacity. New staff should cover Mental Capacity Training as part of the staff induction. All staff should also understand the importance of good record keeping and consent.

Conclusion

The aim of the MCA is to protect patients who lack capacity to make informed decisions. It aims to support their involvement in making decisions as far as an individual is able to. Under the terms of the MCA, patients have a fundamental right to be provided with sufficient information, in a format they understand, about their treatment options. Dental professionals should act to enable patients to make informed decisions based on a clear understanding of the probable outcomes of any treatments they consent to; as well as the probable outcomes of refusing treatment. Dental teams as a whole need to develop high quality policies and procedures for providing patients with sufficient information to allow them to make fully informed decisions. Staff should undertake regular training and know the two-stage test for capacity and the five principles of the MCA.

Dental professionals must make an assessment of the patient's ability to understand the specific treatment being suggested and make an informed decision. It should be remembered that an individual might be able to consent to some treatment but not to others. Dental professionals should consider in the first instance whether the patient can actually consent on their own behalf to the treatment proposed. Obtaining and recording appropriate consent for dental treatment is a fundamental role of the dental team. Advice can be obtained from the clinician's indemnity organisation if required.

Personal Development Plan and Reflective Learning

This CPD is linked to the following GDC Enhanced CPD Development Outcomes:
A. Effective communication with patients, the dental team and others across dentistry, including when obtaining consent, dealing with complaints, and raising concerns when patients are at risk.
D. Maintenance of skills, behaviours and attitudes which maintain patient confidence in you and the dental profession and put patients' interests first.
Reflective learning is now a requirement of the GDC Enhanced Professional Development Scheme. As such, you will be given the option to answer some reflective learning questions, before your certificate is generated. Please remember you can complete or update this at any time.

Further Reading as appropriate to your area of practice

The Mental Capacity Act Code of Practice is important reading. This code of practice, which has statutory force, provides information and guidance about how the Act should work in practice. It explains the principles behind the Act, defines when someone is incapable of making their own decisions and explains what is meant by acting in someone's best interests. It describes the role of the new Court of Protection and the role of Independent Mental Capacity Advocates and sets out the role of the Public Guardian. It also covers medical treatment and the way disputes can be resolved.

- Mental Capacity Act Code of Practice
- The Mental Capacity Act (2005)
- Adults with Incapacity (Scotland) Act 2000
- The Mental Capacity Act (Northern Ireland) (2016)
- Principle Three of the GDC Standards: Obtain Valid Consent

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