Bournemouth University

The National Centre for Post-Qualifying Social Work and Professional Practice

Part of a series of MCA Guidance

The Mental Capacity Act requirements for clinical decisions regarding treatment and care



SANN Safeguarding Adults National Network #SANNnhs

Burdett Trust for Nursing

Office of the Public Guardian

www.ncpqsw.com

Foreword



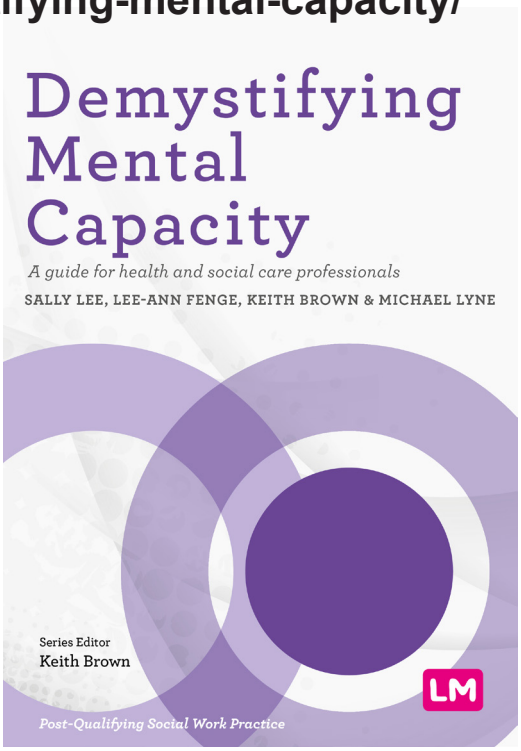
The National Centre for Post-Qualifying Social Work and Professional Practice has produced a series of brief guides to help all health and social care professionals navigate through and apply the principles of the Mental Capacity Act for decisions regarding treatment and care. This is one of those guides and should be read in conjunction with the other guides in the series. These guides can be downloaded for free from www.ncpqsw.com

We trust that these resources will assist all health and social care professionals in delivering the very best possible care in this difficult time of the Covid 19 response and also into the future when we get to the other side of the Covid 19 pandemic.

Prof Keith Brown (April 2020)
Director

National Centre for Post-Qualifying Social Work and Professional Practice (NCPQSW)
Centre for Leadership, Impact and Management Bournemouth (CLiMB)
4th Floor Royal London House, Christchurch Road, Bournemouth, BH1 3LT

The new Demystifying Capacity Sage book available to order at https://uk.sagepub.com/en-gb/eur/demystifying-mental-capacity/book269861



Set against the backdrop of the Mental Capacity Act 2005, this book explores and addresses issues raised by mental capacity within adult safeguarding, and provides clear guidance on the use and value of the MCA, and how to ensure that the rights and choices of individuals are heard, listened to and acted upon.

With contributions from a range of subject experts across the legal, social work, nursing and healthcare disciplines, this book will be invaluable to practitioners in the health and social care profession, and indeed any role where issues of mental capacity may be a concern. Case studies, reflection points and exercise are used to develop understanding and support critical engagement with practice.

Consent to treatment and care

Individuals have the right to freedom of choice for the treatment and care they receive. “An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken” (Montgomery v Lanarkshire [2015] paragraph 87).

Healthcare practitioners must follow due processes to support individuals in this right, in terms of ensuring informed consent for any treatment and care (Department of Health 2009; Care Quality Commission 2011). All registered health professionals are bound by their regulatory and registering bodies published standards to ensure appropriate consent is gained, before any treatment or care is undertaken. Supporting individuals in giving informed consent for clinical decisions, becomes a basic principle for all practitioners involved in the planning and delivery of clinical treatments and care (Bonsall 2015; Regan & Sheehy 2016; RCN 2017; Griffiths 2017).

Reasons why gaining informed consent may be difficult:

- The medical condition may affect an individual’s ability to understand, retain information and weigh up the risks and benefits of a proposed treatment.
- The proposed treatment may be highly complex, with many potential risks – making it difficult to understand the decision and weigh-up the information to give informed consent.
- The setting in which decisions are made may be unfamiliar and frightening, causing anxiety which may impact on the individual’s decision making.
- The pressures on staff, within the care setting, may lead to individuals feeling rushed or intimidated into making a decision.
- The balance of power, knowledge and position between the individual and the professional may affect the autonomy of the individual (Bonsall 2015; Sidin 2016).

Healthcare professionals involved in gaining valid consent to treatment and care should be aware that patients may be vulnerable to pressures from relatives, carers and practitioners to accept a treatment which they fundamentally do not want to receive (RCN 2017). Supporting individuals through consent to treatment processes must allow patients to refuse treatments on any basis, to ensure that any consent to treatment is valid. There should always be the option to say ‘no’ (Grimshaw 2020).

Elements for gaining valid consent – the challenges:

- The individual must be given relevant and understandable information regarding the proposed treatment. Clinical staff must avoid the temptation to use technical or professional language which the individual cannot be expected to understand. How this information is given will be dependent on the needs of the individual receiving it.
- The individual must understand the treatment and care being proposed. This will include the nature of the treatment, the purpose of the treatment and the likely effects of that treatment. This should encompass the benefits and risks of either having or refusing the treatment. The person’s understanding can be in very general terms.
- The individual must have the mental competence and capacity to consent to the treatment.
- The individual must be able to make a voluntary decision to give consent (Based on RCN Guidance 2017 and Montgomery v Lanarkshire [2015]).

Factors affecting mental capacity to consent to treatment and care

There are a range of health conditions which may affect an individual's mental capacity to consent to care or treatment: neurological diseases, mental health issues, learning disabilities, brain injury (traumatic or surgical), delirium, chronic brain failure such as dementia, effects of medication or anaesthesia. However, the presence of a disease or condition of the brain does not, in itself, indicate a lack of capacity (NICE 2018) – it is only when the resulting impairment of brain function caused by a condition affects the person's ability to make decisions, that the level of impairment/cognitive ability needs to be assessed and any incapacity recorded (Brown et al. 2015). A diagnosis may define why someone may lack capacity, but the outcome of this in terms of the individual's ability to make their own decisions must be assessed and recorded (BMA 2018). It is also important to acknowledge that a formal diagnosis may not be available and is thus not strictly necessary to the operation of the Act.



The Mental Capacity Act (2005) is clear that there should always be an **assumption that individuals do have capacity to provide valid consent** – unless otherwise identified and proven. Clinical decision makers should consider a range of factors, when assessing a person's mental capacity to give informed consent; they must ensure that reasonable measures are taken to support the person to make their own decisions regarding proposed treatment and care. Adams et al. (2018) suggest that **person-centred, supported decision making** should enable individuals to make their own decisions about planned treatment and care. Nurses and other health professionals should support, advocate and empower individuals to take an active part in the decisions regarding their treatment and care. This may include allowing appropriate time for the decision-making process, offering support and encouragement to individuals, providing specific care and treatment to enable the individual to make the decision (Grimshaw 2020).

What support should individuals be given to make their own decisions?

- ✓ Ensure that the person has had medication to reduce pain, anxiety, nausea, agitation.
- ✓ Choose a "good time" for the individual – without rushing or distressing them; allowing more time or further occasions to make the decision.
- ✓ Arrange for family or carer support to make the individual feel comfortable and confident to make the decision.
- ✓ Advocate for the individual and helping them with communication barriers – to both understand the decision and also to communicate their decision (Based on NICE guidance 2018).

Who assesses mental capacity?

The Code of Practice for the Mental Capacity Act (Department for Constitutional Affairs 2007) is clear that the assessment of mental capacity to consent should be undertaken by the most relevant professional, with the appropriate experience and knowledge of the treatment and care, with the necessary understanding of the legal requirements in the Mental Capacity Act (2005). Assessment of capacity is not only undertaken by senior medical practitioners, psychiatrists or mental health teams; rather the most appropriate professional for the treatment proposed.

It is common for different health and social care professionals to be involved in the assessment of individuals' mental capacity – where different clinical decisions are being made in different care settings. It is therefore important that multi-professional and multi-agency teams work closely together, to ensure clear communications and collaborative working between professions and agencies, with regards to the assessment of mental capacity of individuals, for different decisions. The mental capacity to give consent to a routine scan or treatment will be very different to that for a complex, high risk procedure with long-term risks and complex options. Practitioners need to be able to make professional judgements as to who is the most relevant person to discuss care and treatment options with the individual, who should be involved in supporting the individual with the decisions needed and who is best placed to assess their capacity to give consent (Grimshaw 2020).

Who should undertake assessment of capacity?

- General healthcare or treatment - capacity to consent should be assessed by the most relevant health professional involved in such care.
- Serious medical treatments – capacity assessment should be undertaken by a senior medical practitioner BMA (2018).



Assessment of Mental Capacity

Assessing the capacity of an individual to make their own decisions regarding treatment and care is not always simple – it is also often not a single event, rather a process of understanding the individual, their condition and their mental ability/capacity.

Factors to remember when assessing mental capacity:

- **Capacity is decision-specific:** assessment of capacity is not a one-off exercise, rather capacity needs to be assessed and recorded for each decision and situation.
- **Capacity is person-specific:** individualised support is needed to each individual, to ensure that they are given all practicable help to make decisions themselves.
- **Capacity is time-specific:** with the exception of urgent or emergency treatment, it is important to support the individual to make a decision at the time most optimal for them. Decisions may need to be delayed or timed when the person is best able to make the decision themselve**s.**
- **Individuals should be given appropriate information:** to help them make decisions themselves. The type of information will depend on the decision needed and the needs of the person.
- **Individuals should be given all practicable help and support to make the decision:** Including help to understand the decision, what is involved and why the proposed care or treatment is needed. They need to be supported to communicate their wishes and choices and to make the specific decision themselves, wherever possible (MCA Code of Practice 2007).

Capacity may vary according to the decisions needed and the complexity of the information involved with each decision. Therefore, an individual may have the capacity to consent to the therapy treatment or the nursing care needed – but lack capacity to consent to the complex surgery or medical treatment required, with a range of risks and potential complications and side-effects.

Assessing Mental Capacity – checklist for practitioners:

- ✓ Presume that an individual has the capacity to make the decision.
- ✓ Understand that mental capacity is person, decision and time specific.
- ✓ Avoid making judgements or assumptions.
- ✓ Take all reasonable steps to help the individual make the decision themselves.
- ✓ Assess decision-making ability – does the person understand the decision? Can they retain the information and weigh up the information relevant to the decision? Can they communicate their decision effectively?
- ✓ Assess capacity - define the impairment of the brain which may impact on mental capacity and how this affects the individual's functional ability to make the decision.
- ✓ Assess the capacity to make more complex decisions – is there need to involve other professionals in the assessment of capacity, e.g. experts, specialists (Based on Brown et al. 2015).

Whilst the MCA provides principles and checklists, it does not define an answer for every case. Thus, there may be differences of opinions, changes to decisions and variations in assessments of capacity at different times, by different professionals, for different decisions.

Clinical decisions where the individual lacks capacity to consent to treatment or care



All health professionals should understand their responsibilities and legal requirements for the treatment or care for those people unable to provide informed consent, due to a lack of mental capacity. The Mental Capacity Act is clear that every reasonable step should be taken to support an individual to make decisions regarding treatment and care for themselves. Where it is clear that the person lacks capacity to consent to treatment or care, the clinical decision-makers need to make alternative arrangements for the care and treatment to be lawful.

References

Adams, D., Carr, C,. Marsden, D. & Senior, K. 2018. An update on informed consent and the effect on the clinical practice of those working with people with Learning Disabilities. Learning Disability Practice Vol 21 No.4 pp 82 – 88

Bonsall, L. 2015. Informed consent: an ethical way of nursing. Lippincott Nursing Centre www.nursingcentre.com/ncblog/may-2015-(1)/informed-consent-an-ethical-way-of-nursing

British Medical Association. 2018. Consent to treatment; adults who lack capacity – medical students' ethics tool kit. www.bma.org.uk

Brown, R., Barber, P. & Martin, D. 2015. The Mental Capacity Act 2005: A Guide for Practice 3rd Edition. London. Sage/Learning Matters

Care Quality Commission. 2011. The Mental Capacity Act 2005 – Guidance for Providers www.cqc.org.uk/sites/default/files/documents/rp_poc1b2b_100563_20111223_v4_00_guidance_for_providers_mca_for_external_publication.pdf

Department for Constitutional Affairs. 2007. Mental Capacity Act: Code of Practice. London. TSO.

Department of Health. 2009. Reference guide for consent to examination or treatment: second edition https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/138296/dh_103653__1_.pdf

Griffiths, R. 2017. Limits to consent to care and treatment. British Journal of Nursing Vol 26; No 16, pp942-943

Grimshaw, K (2020) in Lee, S., Fenge, L-A.., Brown, K. & Lyne, M. (Eds) 2020. Demystifying mental capacity: A guide for health and social care professionals. London. Sage/Learning Matters

Mental Capacity Act (2005) www.legislation.gov.uk/ukpga/2005/9/contents

Montgomery v Lanarkshire Health Board [2015] UKSC11

National Institute of Health and Care Excellence (NICE). 2018. Decision making and mental capacity.

NICE guideline (NG 108) https://www.nice.org.uk/guidance/ng108

Office of the Public Guardian. 2007. Making Decisions: The Independent Mental Capacity Advocate (IMCA) service. OPG606 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/365629/making-decisions-opg606-1207.pdf

Regan, A. & Sheehy, C. 2016. Understanding MCA law and making Best Interest decisions. Nursing Standard Vol 31, No.14 pp54-63

Royal College of Nursing. 2017 Principles of Consent – Guidance for Nursing staff https://www.rcn.org.uk/professional-development/publications/pub-006047

Sidin, A. 2016. The obstacles of valid informed consent. Journal of Medicine & Medical Science Vol 3; No5, pp84-88

The National Centre for Post-Qualifying Social Work & Professional Practice. 2019. Advance Decisions to Refuse Treatment. Bournemouth University

Bournemouth University

The National Centre for Post-Qualifying Social Work and Professional Practice

Authored by:
Karen Grimshaw, Visting Fellow - Independent Nurse Consultant
Michael Lyne, MCA 2005 Programme Lead
Professor Keith Brown, Director of NCPQSW and CLiMB

Designed by:
Caroline Jones, Institute/Centre Administrator
The National Centre for Post-Qualifying Social Work and Professional Practice. Bournemouth University, 4th floor, Royal London House, Christchurch Road, Bournemouth, BH1 3LT

Copyright © The National Centre for Post-Qualifying Social Work and Professional Practice, Bournemouth University, April 2020.

All rights reserved. No part of this publication may be reproduced or utilised in any form or by any means, electronic or mechanical, including photocopying, recording or any information or storage or retrieval without prior permission in writing from the publisher.