Understanding the Mental Capacity Act (2005) and the Implications to Dentistry

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

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)
- Identify who the MCA is designed to protect
- Identify some of the principles of the MCA
- Demonstrate knowledge of things to consider when deciding what is in an individual's best interests

Introduction

The Mental Capacity Act (2005) (the act was last updated in 2007) 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. 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. The same rules apply whether the decisions are life changing events or every day 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

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 Mental Capacity Act, (2005). 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 mentally incapable adults 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

**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.⁴

- **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 'mental capacity' is determined

The MCA 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? 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 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.

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.
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.
- 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?

Consulting with others is a vital part of best interest decision-making. 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.

**Power of Attorney**

A Lasting power of attorney (LPA) allows you to choose people to act on your behalf (as an attorney) and make decisions about your health and personal welfare, when you are unable to make decisions for yourself. This can include decisions about your healthcare and medical treatment, decisions about where you live and day-to-day decisions about your personal welfare, such as your diet, dress or daily routine.

Enduring power of attorney (EPA) only covers decisions about your property and financial affairs; an attorney doesn’t have power under an EPA to make decisions about your health and welfare. EPA has been replaced by Lasting Power of Attorney (LPA). However, if you made and signed an EPA before 1 October 2007, it’s still valid. If someone is still using an EPA they or their family may want to consider setting up a personal welfare LPA to work alongside the existing EPA.

**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.
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.

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 clinicians indemnity organisation if required.

The Mental Capacity Act Code of Practice is important non-verifiable CPD reading and can be accessed now in the non verifiable section of the website. 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.

**Northern Ireland**

There is currently no equivalent law on mental capacity in Northern Ireland. The Bamford Review of Mental Health and Learning Disability was set up in 2002 and completed in 2007 and a publication of its report on legislation reform was produced. Currently Northern Ireland rely on common law. The legislative framework (2007) stated that there should be a single, comprehensive legislative framework for the reform of mental health legislation and the introduction of mental capacity legislation in Northern Ireland.
Since then, considerable time and effort has been applied to developing the new
double legislative framework, which is now referred to as the draft Mental Capacity
Bill. A copy of the Draft Mental Capacity Bill is available as non-verifiable reading on
the website. A power point presentation is also available which discusses the
principles of the draft bill.

Portfolio Tip

Some Suggestions for Further Reading
- Adults with Incapacity Scotland (2000)
- Mental Capacity Act Code of Practice

Don't forget to complete your non verifiable CPD reading log.

References

5. Gov.UK. (2015) Available from: