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Healthcare Briefing

Solicitors

Countdown to the Mental Capacity Act 7 – The Relationship between the Mental Capacity Act and the Mental Health Act

The relationship between the Mental Capacity Act 2005 ("MCA") and the Mental Health Act 1983 ("MHA") is a key issue for Healthcare providers to consider when implementing the MCA. Its importance is recognised by the fact that it is the subject of a specific chapter of the Code of Practice to the MCA[1].

The Code makes it plain that Healthcare professionals should consider using the MHA to detain and treat an individual without capacity (rather than the MCA) where:

(a) It is not possible to provide care or treatment without depriving the individual of his liberty, or

(b) The treatment cannot be given under the MCA (e.g. because of a valid advance decision), or

(c) Restraint in a way that is not permitted by the MCA is required, or

(d) Assessment or treatment cannot be undertaken safely and effectively other than on a compulsory basis (e.g. because the individual may regain capacity and then refuse consent), or

(e) The individual lacks capacity in respect of some parts of the treatment but has capacity in respect of other parts and refuses a key element, or

(f) There is another reason why the person may not receive treatment and as a result the individual or someone else may suffer harm.

The Code provides that before the MHA is used, consideration should be given to using the MCA instead. The MHA cannot be used if the patient is not suffering from a mental disorder that justifies detention in Hospital, or if physical treatment only is required.

[1] See Chapter 13

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Where an individual is subject to the MHA, the MCA still applies to them notwithstanding the application of the MHA, save for:

(a) Where an individual is detained under the MHA, MCA decision makers cannot rely on the MCA to authorise treatment for mental disorder.

(b) The compulsory treatment sections of the MHA override an advance decision or LPA.

(c) Where an individual is subject to Guardianship under the MHA, the Guardian has the exclusive right to make certain decisions such as where the person is to live.

(d) There is no need to involve an IMCA in decisions about serious medical treatment or accommodation where those decisions are made under the Mental Health Act.

Much of the MHA does not distinguish between individuals who have or do not have capacity. Nevertheless the MCA still applies to individuals without capacity to the extent that this is not covered by the MHA (such as most decisions regarding their property).

Where an individual is not detained under the Mental Health Act, Section 5 of the MCA provides legal protection for Healthcare professionals who provide care and treatment for an individual who lacks capacity. However there are limitations to the Defence. For example, restraint may only be used if it is:

- Necessary to protect the person who lacks capacity from harm, and
- In proportion to the likelihood and seriousness of that harm.

Section 5 does not however provide protection for actions that deprive a person of their liberty. Nor does it allow treatment to be given that conflicts with a valid advance decision. On the other hand, none of these restrictions apply to treatment for mental disorder under the Mental Health Act.

The Code of Practice provides specific guidance on the application of the MCA to cases where a patient is subject to guardianship or aftercare under supervision. It also makes it clear that an individual does not lack capacity simply because they are subject to the MHA.

The Code provides guidance on the effect of the MHA on Attorneys and Deputies appointed by the Court of Protection.

Reference to Chapter 13 of the Code should be made whenever considering the relationship between the MCA and the MHA.

Since the Code was published the Mental Health Act 2007 has been passed. This contains an amendment to the Mental Capacity Act to plug the Bournewood Gap and provide a scheme of authorisation where the Care Plan for an incapacitated individual amounts to a deprivation of their liberty.

For further details of these proposals see our Mental Health Law Briefing No. 114.