The Mental Capacity Act And 16/17 year olds

Objectives

To gain an understanding of :

- How the MCA applies to people who are 16 and 17 years old;
- The overlap between the Children Act and Mental Capacity Act
- What can be done for young people to maximise their capacity to make their own decisions;
- Deprivation of Liberty and 16/17 year olds –an update on developing case law.

Definitions

For clarity, the following definitions apply in the MCA and the Code of Practice:

- An “Adult” is a person aged 18 years or over.
- A “Young Person” is a person aged 16 or 17 years old.
- A “Child” is a person under the age of 16 years old.
- This differs from the Children Act 1989 and the law more generally where the term “child” is used to refer to people aged under 18.

The Mental Capacity Act

The Mental Capacity Act, (2005), which was enacted in 2007, applies to all people over the age of 16 years who live in England and Wales and who may lack the capacity (within section 2(1)) to make all or some decisions for themselves

Where the MCA does not apply to young people aged 16-17

There are certain parts of the MCA that do not apply to young people aged 16-17 years. These are:

- Only people aged 18 and over can make a Lasting Power of Attorney, (LPA);
- Only people aged 18 and over can make an advanced decision to refuse medical treatment;
- Making a will. The law generally does not allow people under 18 to make a will and the MCA confirms that the Court of Protection has no power to make a statutory will on behalf of anyone under 18.

Where the MCA Applies to Children under the age of 16

- In most situations, the care and welfare of children under 16 will continue to be dealt with under the Children Act 1989. There are, however, two parts of the MCA that apply to children under 16:
- The Court of Protection can make decisions about a child's property or finances, (of can appoint a deputy to make these decisions), if the child lacks capacity to make to make such decisions within section 2(1) of the Act and is likely to still lack capacity to make financial decisions when they reach the age of 18.
- The criminal offence of ill treatment or wilful neglect of a person who lacks capacity applies to children under 16 as no lower age limit is specified for the person caused harm/victim.

Parental Responsibility and the MCA

- Parental Responsibility, (PR), refers to the “rights, duties, powers, responsibilities and authority which by law a parent has in relation to a child”, (Children Act 1989). Parental Responsibility lasts until the young person, (“child” under Children Act 1989), is 18.
- People with PR for a young person may make decisions on behalf of that young person. The decisions that a person with PR can make are those decisions that are seen to sit within the zone of parental control. The zone of parental control is a legal concept describing which decisions a parent should be able to take concerning their child's welfare.

Parental Responsibility and the MCA

There is no codified statement of which decisions come into the zone of parental control. However, the MHA Code of Practice, (36.10), notes two points that should be borne in mind when considering whether a decision comes within the zone of parental control:

- Is the decision one that a parent would be expected to make?
- Are there any indications that the parent might not act in the young persons best interests?
- We should also consider:
- Is the young person resisting?
- The nature/invasiveness of what is proposed.

Consent to treatment

- Under the Family Law Reform Act 1969, all people over the age of 16 are presumed to have the capacity to consent to surgical, medical or dental treatment and to associated procedures, such as investigations, anaesthesia and nursing care.
- However, this presumption does not mean that a young person is able to make the relevant decision and decision makers should assess the young persons capacity to consent to the proposed care/treatment. If the young person lacks capacity to consent, then the MCA will apply in the same way as it does to adults.

Consent to Treatment

- However, the Code of Practice says that if a young person lacks the capacity to make a specific care/treatment decision, the healthcare staff providing treatment, or the care staff providing care, can carry out treatment/care with protection from liability whether or not a person with PR consents.
- They must follow the Act's principles, consider all the factors in the checklist and ensure that the acts they carry out are in the young persons best interests. They must take into account the views of everyone interested in the young persons welfare, including those with PR.

Capacity at 16 years

- The moment that a young person wakes up on the morning of their 16th birthday, they are presumed to have the capacity to make their own decisions under the MCA.
- All those involved in supporting a young person are obliged to have regard to the MCA in all that they do in relation to that young person. If you work with young people who lack capacity and you are a professional and/or you are paid for the work you do, you have a legal duty to have regard to the MCA Code of Practice.

The five principles

- **Principle 1 - Assume Capacity**

A young person must be assumed to have capacity until proved otherwise

- **Principle 2: All Practicable Support**

A person must not be treated as unable to make a decision/without capacity unless all practicable steps to help them to do so have been taken without success

- **Principle 3: Unwise Decisions**

A person must not be treated as unable to make a decision merely because they have made an unwise one.

- **Principle 4: Best Interests**

If an act is done, or a decision taken, on behalf of a person who lacks capacity it must be done, or made, in their best interests.

- **Principle 5: Least Restrictive**

Any act done, or a decision made, in a persons best interests, must be the least restrictive of the person's rights and freedom of action.

Principle 1: Assume Capacity

- Are we assuming capacity-or allowing an assumption of incapacity?
- What have we got in place for young people to ensure that the presumption of capacity is being made?
- Do our assessments and our care plans/IEP's for young people 16+ reflect this presumption?
- Do our policies, systems and paperwork reflect this presumption?
- Do all staff working with young people, young people or their parents have a good awareness of MCA?

Principle 2: All Practicable Support

When we think about what “all practicable steps” means for a particular young person, we should also think about when we need to start taking those steps. If we know that in the future a decision needs to be made, we can start work now to maximise the young persons capacity to make the decision.

Principle 3: Unwise Decisions

- It can be hard for those working with very vulnerable and still very young people to support unwise decision making – recognising that “best interests” decisions should not be made if a person is deemed to have capacity to choose for themselves can be a challenge if the result may be harmful to the person.
- Balancing the implications of the MCA, our duty of care and our responsibilities under safeguarding procedures can be difficult-especially if families are struggling and challenge us.
- Have we got the right training in place, for workers and families?
- Are we offering enough supervision to staff and support to carers?

Principle 4: Best Interests

- Often, we will know an individual child is likely have capacity to make some “day to day decisions” when they reach 16, but is unlikely to have the capacity to make bigger decisions. If we know this about a child, and we know that “big” decisions will need to be made, we should ask not only what we can do to maximise the possibility of capacity, but also
- “What can we do now to ensure that a future decision maker has good evidence on which to base a best interests decision?”
- What do we know about what the person enjoys or really doesn’t like? What matters to the child? What evidence do we have for this? What other evidence could we find?
- What more can we learn about them to inform decision making?

Principle 5: Least Restrictive

- The search for the least restrictive way to meet an outcome can uncover amazing creativity not only among staff but also service users and families.
- It may take a bit more work to plan, co-ordinate, implement and monitor the support given –but the delight in finding an imaginative solution that keeps a person safe and respects their right/freedom of actions is one of the best parts of working in social care.
- And for young people, the earlier we get started the better.

What is Deprivation of liberty

The Cheshire West case in 2014 gave us the “Acid test” for Deprivation of Liberty, namely:

- is the person “under continuous supervision and control and not free to leave?”
- If the circumstances in which a young person is supported amount to a Deprivation of Liberty under the acid test, this deprivation must be authorised by the Court.

Case Law-Deprivation of Liberty and 16/17 year olds

D, (a child), Re [2015], EWHC.

This was the case of a 15 year old, D, who has Asperger's, LD, ADHD and Tourette's and who was living under continuous supervision in a hospital setting and was not free to leave.

The judge found that D was not unlawfully deprived of his liberty because it was with his parents consent. The judgement was that the legal authority of a parent to consent to the detention or treatment of a 16 or 17 year old “is severely curtailed if not removed. The threshold is obtaining the age of 16”. Any deprivation of liberty for a young person of 16/17, it was suggested, would need to be sanctioned by the Court of Protection pursuant to the provisions of the MCA.

Case Law-Deprivation of Liberty and 16/17 year olds

Birmingham City Council v D, (21stJan 2016)

This was very recently updated when the local authority involved took the case back to court when D reached 16. D was by then living in a specialist residential unit.

The judge held that things change when a young person turns 16. It is not enough to rely on parental consent when a 16 year old is under continuous supervision and not free to leave, and such a case will always need an application to the court of protection for authorisations.

The judge was clear that resource implications were not relevant-“the protection afforded by Article 5(1) is too important and fundamental to be sacrificed on the alter of resources, (para 137-138)”.

Case Law-Deprivation of Liberty and 16/17 year olds

AB, (a child Deprivation of Liberty) Re [2015], EWHC 3125,

This case involved AB, a young person on an interim care order who met the acid test for Deprivation of Liberty, and whether PR could be relied upon to sanction that Deprivation of Liberty.

The answer to the question as to “whether, where a child is in the care of a LA and subject to an interim care, or care, order, the LA may in its exercise of its statutory parental responsibility consent to what would otherwise amount to a deprivation of liberty” was “an emphatic no”. The deprivation of liberty would need to be authorised by the court.

Advice re Deprivation of Liberty in 16/17 year olds

Before a child with disabilities reaches the age of 16, we should review their living arrangements to see whether they will subsequently amount to a deprivation of liberty. If this is the case, and the young person lacks capacity in relation to this, an application to the court should be considered since the parents' consent to the deprivation of liberty will no longer be sufficient to authorise the deprivation of liberty upon the date of their 16thbirthday.

In the case of children subject to interim or care orders, the local authority should consider whether any children in need or Looked after Children are, (especially in foster care or residential placement), subject to restrictions amounting to a deprivation of liberty. In these circumstances an application to the court is required as the LA cannot consent to a deprivation of liberty.

The Decision maker

- The decision-maker will need to assess the young person's capacity and best interests. Following the best interests checklist (MCA section 4) the decision-maker will consult people involved in the care and support of the young person which will include, but not be limited to, people who have parental responsibility.

- If the young person is not befriended – has no family or friends who could be consulted about the decision – a referral for the support of an Independent Mental Capacity Advocate may be necessary. A referral will need to be made if the decision concerns serious medical treatment or a change of accommodation.

- If the decision-maker doesn't agree with the views of the young person's parents or others it will be necessary to follow the same procedure as for any decision – a best interests meeting, use of advocates and mediation as appropriate.

- The Court of Protection can make determinations about a young person's capacity or a best interest's decision. This should only be used as a last resort.

If the decision is controversial, make sure you have obtained legal advice and support. Contact your local MCA Lead or Safeguarding Adults Team for advice about MCA; the Child Protection team may also need to be involved.

Thank you