

## CHAPTER 1

# Introduction: Anatomy of the Mental Capacity Act and its terms

This introductory chapter provides a simple guide to the legislation, the sources of further help, the terms used, the organizations involved, and the structure of this book.

The Mental Capacity Act 2005 had been awaited for over 15 years and fills a huge gap in the statutory (i.e., by Act of Parliament) provisions for decision making on behalf of mentally incapacitated adults. This introduction sets out the main provisions of the Act in a nutshell and explains some of the terms used, the links with later chapters, and the scenarios where these topics are considered in full.

*Two basic concepts* underpin the Act—the concept of capacity and the concept of best interests:

*Mental capacity:* only if an adult (i.e., a person over 16 years) (referred to in this book as P) lacks mental capacity can actions be taken or decisions made on his or her behalf. Capacity is defined in Sections 2 and 3 (see Chapter 4). It is important to stress that the term “mental capacity” is used in a specific functional way. A person may have the capacity to make one type of decision but not another. For this reason, the term “requisite” mental capacity is used frequently throughout this book to remind readers that it is the capacity in relation to a specific decision which is in question.

*Best interests:* if decisions are to be made or action taken on behalf of a mentally incapacitated person, then they must be made or taken in the best interests of that person. The steps to be taken to determine “best interests” are set out in Section 4. There is no statutory definition of “best interests” (see Chapter 5). Where a

person has appointed an attorney for property and affairs or personal welfare or set up an **advance decision**, the provisions within the instruments apply, and these may differ from the best interests of the person lacking mental capacity.

*Principles:* Section 1 sets out five basic principles which apply to the determination of capacity and to acting in the best interests of a mentally incapacitated adult. These five principles are as follows:

- 1 A person must be assumed to have capacity unless it is established that he or she lacks capacity.
- 2 A person is not to be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success.
- 3 A person is not to be treated as unable to make a decision merely because he or she makes an unwise decision.
- 4 An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his or her best interests.
- 5 Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.

These principles are considered in Chapter 3.

*Human rights:* the United Kingdom was a signatory to the European Convention on Human Rights in 1950, and those wishing to bring an action under its provisions went to Strasbourg where the ECHR was based. However as a consequence of the Human Rights Act 1998, most of the articles of the Convention were

incorporated into the laws of England, Wales Northern Ireland, and Scotland. This enabled any persons who claim that their human rights as set out in Schedule 1 to the Human Rights Act 1998 have been violated by a public authority to bring an action in the courts of the United Kingdom (UK) (Schedule 1 is discussed in Chapter 3). The definition of exercising functions of a public nature has been extended and is considered in Chapter 3.

*The Convention on the International Protection of Adults* is given statutory force by the Mental Capacity Act (MCA) and is set out in Schedule 3 to the MCA. Its provisions are considered in Chapter 3.

P is the person who lacks (or who is alleged to lack) capacity to make a decision(s) in relation to any matter.

*Lasting power of attorney (LPA)*: the Act enables a person, known as P, when mentally capacitated to appoint a person known as the **donee** to make decisions about P's personal welfare at a later time when P lacks mental capacity. The LPA can also cover financial and property matters, and these powers can be exercised even when the donor has the requisite mental capacity. The LPA may be general and not identify particular areas of decision making, or it may specify the areas in which the donee can make decisions. It replaces the **enduring power of attorney (EPA)** which only covered decisions on property and finance. There are transitional provisions to cover the situation where a person has drawn up an EPA, and these are set out in Schedule 4 and discussed in Chapter 17. LPAs are considered in Chapter 6.

*Court of Protection*: a new Court of Protection replaced the previous Court of Protection and has powers to make decisions on personal welfare in addition to property and affairs. (The previous Court could only consider matters relating to property and affairs.) Its powers, functions, constitution, and appointment of the **Court of Protection visitors and deputies** are discussed in Chapter 7.

*Deputies*: the Court of Protection has the power to appoint deputies to make decisions on the personal welfare, property, and affairs of the mentally incapacitated adult. These powers and the restrictions upon them are considered in Chapter 7.

*The Office of the Public Guardian* is appointed by the Lord Chancellor to set up and maintain registers of

LPAs, EPAs, and deputies. It supervises deputies and provides information to the Court of Protection. It also arranges for visits by the Court of Protection visitors. A **Public Guardian Board** scrutinizes and reviews the way in which the Public Guardian discharges its functions. These offices are discussed in Chapter 7.

*Independent mental capacity advocates (IMCAs)*: the Act makes provision for such persons to be appointed to represent and support mentally incapacitated adults in decisions about accommodation, serious medical treatment, and adult protection situations. These advocates are appointed under **independent mental capacity advocate services** which are established to provide independent advocates for mentally incapacitated adults in specified circumstances. They represent and support mentally incapacitated adults in decisions by NHS organizations on serious medical treatment and in decisions by NHS organizations and local authorities on accommodation. The original remit of the IMCAs has been extended to cover care reviews and situations where adult protection measures are being taken. The arrangements for advocacy are considered in Chapter 8.

*Litigation friend*: the court can appoint anyone to be a litigation friend (a parent or guardian, family member or friend, a solicitor, professional advocate, a Court of Protection deputy, an attorney under an LPA). If there is no suitable person, the Official Solicitor can be appointed. A certificate of suitability must be completed, and there must be no conflict of interest between the litigation friend and P. The Court of Protection Rules 140 to 149 make provision for the appointment of litigation friends (see Chapter 7).

*Official Solicitor*: the OS acts as the litigation friend or solicitor to those who lack the capacity to make their own decisions or conduct litigation. The role is more fully considered in Chapter 7.

*Relevant person's representative*: when a Deprivation of Liberty has been authorized, the supervisory body must appoint a representative in respect of the person concerned. The role of the RPR is to maintain contact with P and support and represent them in matters relating to their deprivation of liberty. Regulations covering the appointment, termination,

and payment were passed in 2008.<sup>1</sup> They are discussed in Chapter 14. In the case of *AB v. LCC (A Local Authority)* [2011],<sup>2</sup> Mostyn J considered the difference between an RPR and a litigation friend. The case is considered in Chapter 14 on Deprivation of Liberty Safeguards.

*Advance decisions to refuse treatment* (also known as living wills or advance refusals) are given statutory recognition, and special requirements are specified if these advance decisions are to cover the withdrawal or withholding of life-sustaining treatment. The definitions of an advance decision and the statutory provisions are considered in Chapter 9.

*Research on mentally incapacitated adults* is subject to specific qualifications, and unless these are complied with, the research cannot proceed. The provisions are discussed in Chapter 10.

*Codes of Practice* must be prepared by the Lord Chancellor, and their legal significance is considered in Chapter 17.

*An offence of ill treatment or wilful neglect of a person who lacks capacity* is created by the Act, and this offence, together with other criminal offences in relation to a mentally incapacitated adult and the accountability of those who make decisions on their behalf, is discussed in Chapter 11.

*Court cases:* there have been some significant judicial decisions on the aspects of the Act. The most significant include the following:

*Aintree University Hospitals NHS Foundation Trust v. James* [2013]<sup>3</sup> (see Chapter 5).

*P (by his litigation friend the Official Solicitor) v. Cheshire West and Chester Council & Anor and P and Q (by their litigation friend, the Official Solicitor) (Appellants) v. Surrey County Council (Respondent)* [2014]<sup>4</sup> (see Chapter 14).

*Nicklinson and Anor R (on the application of) (Rev 1)* [2014]<sup>5</sup>—assisted suicide (see Chapters 2 and 11).

*R (McDonald) v. Kensington and Chelsea Royal London Borough Council* [2011]; *McDonald v. UK Chamber judgement* [2014]<sup>6</sup> ECHR 492, article 8—rights and night-time attendance (see Chapter 3); ECHR *McDonald v. UK* (Application no 4241/12), European Court of Human Rights, Times Law Report 2014.

*Dunhill v. Burgin*. The Times Law Report, March 28, 2014, SC [2014]<sup>7</sup>—capacity to litigate (see Case Study 4.3).

*Montgomery v. Lanarkshire Health Board* [2015] UKSC<sup>8</sup>—duty to give patient information about any material risks involved in the treatment. The Supreme Court recognized the doctrine of informed consent (see Chapter 2).

## Mental health and mental capacity

Treatments for mental disorder given to patients who are detained under the **Mental Health Act 1983** (as amended by the 2007 Act) are excluded from the provisions of the MCA. The distinction between the concepts of mental disorder and mental incapacity is considered in Chapter 13.

## Deprivation of Liberty safeguards

The **Bournewood case**, sometimes referred to as the **Bournewood gap**, was heard by the European Court of Human Rights which held that it was a breach of Article 5(1) for a person with learning disabilities to be kept in a psychiatric hospital under the common law doctrine of necessity (and therefore without being detained under the Mental Health Act 1983). As a consequence of this decision, it was apparent that the mental health law in England and Wales did not provide sufficient protection for those persons incapable of giving consent to admission to a psychiatric hospital and who were being held outside the Mental Health Act 1983 in breach of Article 5(1). This gap in the law, the case itself, the Department of Health (DH) consultation paper on how the gap could be filled, and the provisions made in the Mental Health Act to fill the gap are considered in Chapters 3 and 14. The necessary changes to the MCA are known as the **Deprivation of Liberty safeguards** and are considered in Chapter 14.

## Coming into force of the MCA

The IMCA service came into force in England in April 2007 and in Wales in October 2007.

The criminal offence of ill treatment or wilful neglect of a person who lacks capacity came into force in April 2007.

Sections 1–4 covering the principles, definition of mental capacity, best interest and guidance in the Code of Practice came into force in relation to IMCAs in April 2007.

All other provisions came into force in October 2007 (except for specific provisions relating to research—see Chapter 10).

**Protection of mentally incapacitated adults** provided in other statutory provisions is also included in this book to provide a comprehensive view and is considered in Chapter 11.

**Statutory law** (made by Parliament) and **common law** (judge made or case law) are contrasted and explained in Chapter 2, which sets out the background to the passing of the Mental Capacity Act 2005.

Since devolution, Wales has enjoyed the ability to pass its own statutory instruments and issue its own guidance on health and social services law. Chapter 18 considers some of the differences in Wales. The Code of Practice drafted by the Department of Constitutional Affairs does however apply to Wales.

Scotland enacted an Adults with Incapacity (Scotland) Act in 2000, and the main legislation for Scotland and Northern Ireland is considered briefly in Chapter 18 of this book.

*Bolam test*: this is taken from a case heard in 1957<sup>9</sup> which was concerned with how negligence should be established. The judge held that the doctor must act in accordance with a responsible and competent body of relevant professional opinion. This is discussed in Chapter 11 on accountability.

*Protection of Vulnerable Adults (POVA)*: Government policy supported by several statutory provisions is designed to support vulnerable adults (see Chapter 11).

*General authority*: this was a concept used in earlier versions of the Mental Capacity Bill to denote the power of a person to act out of necessity in the best interests of a mentally incapacitated adult. However it was considered to be misleading by the Joint Committee of the Houses of Parliament and was not included in the MCA.

*Children*: the MCA applies to young persons over 16 years and adults. There are some provisions however which can apply to persons younger than that, and there are differences in law between the young person of 16 or 17 and a person of 18 and over. These are considered in Chapter 12.

*Human tissue and organ removal, storage, and use*: special protection is given to those lacking the requisite

mental capacity to give consent to the removal, storage, and use of human tissue and organs by the MCA and the Human Tissue Act and regulations under both Acts. This topic is considered in Chapter 15.

### Sources of help

Any person trying to unravel the impact that the MCA has on their work or on the rights of the mentally incapacitated adult for whom they care will find extremely extensive resources for assistance. The main source of assistance is the website of the Ministry of Justice<sup>10</sup> which took over from the Department for Constitutional Affairs (DCA) in May 2007. The Ministry of Justice through the Office of the Public Guardian has published many leaflets and booklets explaining the Act for a wide variety of readers, and these can be downloaded from its website. They include a guide for users/clients or patients (*Making decisions about your health welfare or finance. Who decides when you can't?* (OPG601)); for family, friends and other unpaid carers (OPG602); for people who work in health and social care (OPG603); for advice workers (OPG604), an easy read guide (OPG605); and for independent mental capacity advocates (OPG606). They are accessible on the Ministry of Justice website.<sup>11</sup>

The Mental Capacity Act 2005 itself can be downloaded from the Ministry of Justice website and from the UK legislation site.<sup>12</sup> All the Statutory Instruments referred to can be downloaded from these sites. Hard copies of the legislation can be purchased from the Stationery Office. The Chambers at 39 Essex Street run a website which issues a newsletter, summarizes, and comments on Court of Protection cases which can be accessed.<sup>13</sup>

The Social Care Institute for Excellence provides guidance and training on a variety of topics and has set up a Mental Capacity Act (MCA) Directory which can be accessed on its website.<sup>14</sup>

Many other resources on the MCA and DOLs are listed in Appendix B to the Care Quality Commission fifth annual report monitoring the use of DOLs 2013/4 which is available online.<sup>15</sup> It gives the title of the document, the provider, and its website.

**The Code of Practice** has been compiled by the Lord Chancellor across a significant number of areas (see Chapter 17). It can be accessed from the website of the Ministry of Justice.<sup>16</sup> The Code of Practice should be

followed by health and social services professionals and those listed in Section 42(4). However whilst it is not statutorily binding upon the informal or unpaid carer, there would be considerable benefit for such persons to follow the guidance in the code. An additional Code of Practice has been prepared to cover Deprivation of Liberty Safeguards<sup>17</sup> (see Chapter 14). The Code of Practice relating to the Mental Health Act was revised in 2015.

*Explanatory Memorandum:* accompanying the statute and available from the HMSO website is an Explanatory Memorandum which provides guidance in understanding some of the statutory provisions. It is not in itself the law but could provide some help in comprehending some of the more difficult provisions.

*Memorandum submitted to the Joint Committee on Human Rights in response to its letter of 18 November 2004:* the report of the Joint Committee of Parliament<sup>18</sup> provides further insight into the thinking behind the legislation and is discussed throughout this book as appropriate. The report can be downloaded from the Ministry of Justice website.

*Professional guidance:* many of the professional associations of those involved in the care of mentally incapacitated adults are drawing up detailed guidance for their members on the provisions of the Act, and this is available from their websites (see website list).

*Protocols, procedures, guidance from the Care Quality Commission, and other regulatory organizations:* guidance has been issued by the CQC. Its recommendations following visits of inspection are not in themselves the law, but they could provide evidence of good practice. Similarly, conclusions and recommendations following inquiries carried out by the Health Service Commissioner or Ombudsman and the Ombudsman for local authorities may be extremely helpful to those involved in the care of those lacking mental capacity. The Nursing and Midwifery Council and the General Medical Council and other regulatory bodies have also issued guidance on the MCA for their registered practitioners.

*Protocols, procedures, and guidance from employers:* many National Health Service (NHS) trusts and care trusts and social services departments have prepared protocols, guidelines, policies, etc., to assist their staff in implementing the laws which apply to decision making on behalf of mentally incapacitated adults. These in

general should be followed by the staff, but registered practitioners also need to use their professional discretion and ensure that such guidance is in accordance with the basic principles of law and practice, as recommended in the codes of practice of their registered bodies.

*Protocols, procedures, guidance, and information from organizations involved in the care and protection of mentally incapacitated adults:* many organizations which are involved in providing care and protection for mentally incapacitated adults gave advice and information to Parliament and in particular to the Joint Committee during the progress of the Mental Incapacity and Mental Capacity Bills through Parliament. These organizations have continued to advise their members and other interested persons on the best practice in caring for and offering support and assistance to those lacking mental capacity. The websites of some of these organizations are set out in the list of websites on pages x to xiv. They include the Alzheimer's Society and Mencap.

## Professional legal advice

39 Essex Street Chambers has a Court of Protection team which provides online updates on cases relating to the Mental Capacity Act and has also produced a training DVD to provide a comprehensive training to assist decision makers in understanding the legal requirements imposed by the MCA and the courts. Further information is available on its website.<sup>19</sup> The Local Government Lawyer website also provides guidance on the Act and recent cases.<sup>20</sup>

## Terms used

Many of the terms employed in the Act may alienate those who are seeking to obtain a greater understanding of the law. Many of the probably unfamiliar terms such as lasting power of attorney, donee, deputy, and advance decision are considered in context and are mentioned previously with the chapters cited in which they are further discussed.

A **glossary**, supplied at the end of this book, explains other legal terms with which the reader may not be familiar.

## Organizations involved in the care and support of adults who lack mental capacity

The causes of mental incapacity are diverse. Some suffer from severe learning disabilities acquired as a result of brain damage at birth or genetic causes and would therefore never have enjoyed having capacity. Others may have lost their mental capacity as a result of deteriorating diseases such as Alzheimer's or of a trauma such as a road accident. These persons once had capacity, and it is possible from discussions with family and friends to piece together a picture of that person's earlier beliefs, philosophy, and likes and dislikes which can be used in determining "best interests."

The organizations providing support for such adults include the following:

*Public authorities:* NHS England, NHS trusts, clinical commissioning groups, care trusts, social services departments.

*Charitable and voluntary organizations:* these include many residential and care homes, community support homes, care agencies, and leisure organizations providing services for the disabled.

*Profit-making organizations:* these provide many and varied services, often in contract with public authorities.

All such organizations may provide useful information on the care and support of those lacking mental capacity. A list of websites is provided in this book.

**Scenarios** are included in each of the main chapters to illustrate some of the situations which may arise and to assist in explaining how the new statutory provisions are likely to work.

*Future changes:* inevitably there have been disputes over the interpretation of some of the statutory provisions, and these disputes have resulted in court hearings and judgments which set precedents on how the Act is to be interpreted and thus become part of the common law (see Chapter 2). The House of Lords Select Committee carried out a postlegislative scrutiny of the Mental Capacity Act in 2013–4<sup>21</sup> and made many significant recommendations for change. The Government responded positively<sup>22</sup> and as a consequence there are likely to be significant changes in particular to the regulations relating to the deprivation of liberty safeguards and to the criminal offence of ill treatment or wilful neglect of

a person lacking mental capacity under Section 44. The recommendations and response are discussed in each relevant chapter. In 2015 the Law Commission was asked to review the law on Deprivation of Liberty Safeguards. It is due to report with draft legislation at the end of 2016, and following consultation and Parliamentary debate, revised legislation could be implemented by the end of 2017.

## Quick fire quiz, QFQ1

- 1 What two concepts underline the Mental Capacity Act 2005?
- 2 How does the Act define "best interests"?
- 3 What are the five principles set out in the Act?
- 4 What is the difference between statute and common law?
- 5 How does the Human Rights Act 1998 relate to the Mental Capacity Act 2005?
- 6 Can a lasting power of attorney be exercised on behalf of a person who has the requisite mental capacity?

Answers can be found on pages 335–343.

## References

- 1 The Mental Capacity (Deprivation of Liberty) Appointment of Relevant Person's Representative Regulations 2008 SI 1315.
- 2 *AB v. LCC (A local authority)* [2011] EW COP 3151.
- 3 *Aintree University Hospitals NHS Foundation Trust v. James* [2013] UKSC 67.
- 4 *P (by his litigation friend the Official Solicitor) v. Cheshire West and Chester Council & Anor and P and Q (by their litigation friend, the Official Solicitor) (Appellants) v. Surrey County Council (Respondent)* [2014] UKSC 19.
- 5 *Nicklinson and Anor R (on the application of) (Rev 1)* [2014] UKSC 38.
- 6 *R (McDonald) v. Kensington and Chelsea Royal London Borough Council* [2011] UKSC 11; *McDonald v. UK Chamber judgement* [2014] ECHR 492; ECHR *McDonald v. UK* (Application no 4241/12), European Court of Human Rights, Times Law Report 2014.
- 7 *Dunhill v. Burgin*. The Times Law Report, March 28, 2014 SC [2014] UKSC 18.
- 8 *Montgomery v. Lanarkshire Health Board* [2015] UKSC 11.
- 9 *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582.
- 10 [www.justice.gov.uk](http://www.justice.gov.uk)
- 11 [www.gov.uk](http://www.gov.uk)
- 12 [www.legislation.gov.uk](http://www.legislation.gov.uk)
- 13 [www.39essex.com](http://www.39essex.com)
- 14 [www.scie.org.uk](http://www.scie.org.uk)
- 15 [www.cqc.org.uk](http://www.cqc.org.uk)

- 16 [www.justice.gov.uk](http://www.justice.gov.uk)
- 17 Ministry of Justice Code of Practice. Deprivation of Liberty Safeguards, June 2008.
- 18 House of Lords and House of Commons Joint Committee on the Draft Mental Incapacity Bill Session 2002–2003. H.L. paper 189–91; H.C. 1083–1.
- 19 [www.39essex.com](http://www.39essex.com)
- 20 [www.localgovernmentlawyer.co.uk](http://www.localgovernmentlawyer.co.uk)
- 21 House of Lords Select committee on the Mental Capacity Act 2005 Report of session 2013–4 HL Paper 139 Stationery Office March 2014; [www.publications.parliament.uk](http://www.publications.parliament.uk).
- 22 HM government valuing every voice respecting every right: making the case for the Mental Capacity Act, the Government response to the House of Lords Select Committee on the Mental Capacity Act, June 2014.

<http://www.pbookshop.com>