

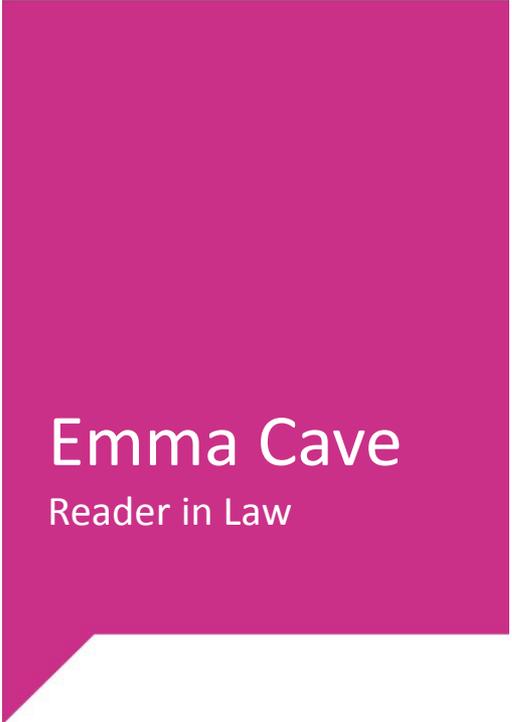
# Minding the Gaps

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## **The Mental Capacity Act, Children and Mental Health**

Should we rethink involuntary interventions outside the scope of the MCA?

SEE FURTHER: Emma Cave, 'Determining Capacity to Make Medical Treatment Decisions: Problems Implementing The Mental Capacity Act 2005' (2015) 36 (1) Statute Law Review 86-106. doi: 10.1093/slr/hmu034



Emma Cave  
Reader in Law

# The MCA – ‘liberal, progressive and rights based’.

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## Lords Select Committee:

- Gap between theory and practice
  - Poor compliance
  - Safeguarding over empowerment
  - Support for the Act’s principles.
- Focuses on awareness, implementation, compliance.

Select Committee on the Mental Capacity Act 2005, Mental Capacity Act 2005: Post-Legislative Scrutiny, HL Paper 139, (March 2014).

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# The MCA: a 'single comprehensive piece of legislation making provisions for people who lack capacity'

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Law Commission's 1995 report on Mental Incapacity (Law Com 231) followed a long period of consultation. Paragraph 1.1 states:

***"It is widely recognised that, in this area, the law as it now stands is unsystematic and full of glaring gaps. It does not rest on clear or modern foundations of principle. It has failed to keep up with social and demographic changes. It has also failed to keep up with developments in our understanding of the rights and needs of those with mental disability."***

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How far are these criticisms true today?

# The MCA: a 'single comprehensive piece of legislation making provisions for people who lack capacity'

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 *U16s – Gillick competence*

 *DL v A Local Authority [2012] EWCA Civ 253.*

**MCA Code of Practice: 12.15** If a young person lacks capacity to consent within s2(1) of the Act because of an impairment of, or a disturbance in the functioning of, the mind or brain then the MCA will apply in the same way as it does to those who are 18 and over. If however they are unable to make the decision for some other reason, for example because they are overwhelmed by the implications of the decision, the Act will not apply to them and the legality of any treatment should be assessed under common law principles.

 MHA 1983

**Law Comm 1995: 'The law has failed to keep up with human rights developments and the needs of those with mental disability'**

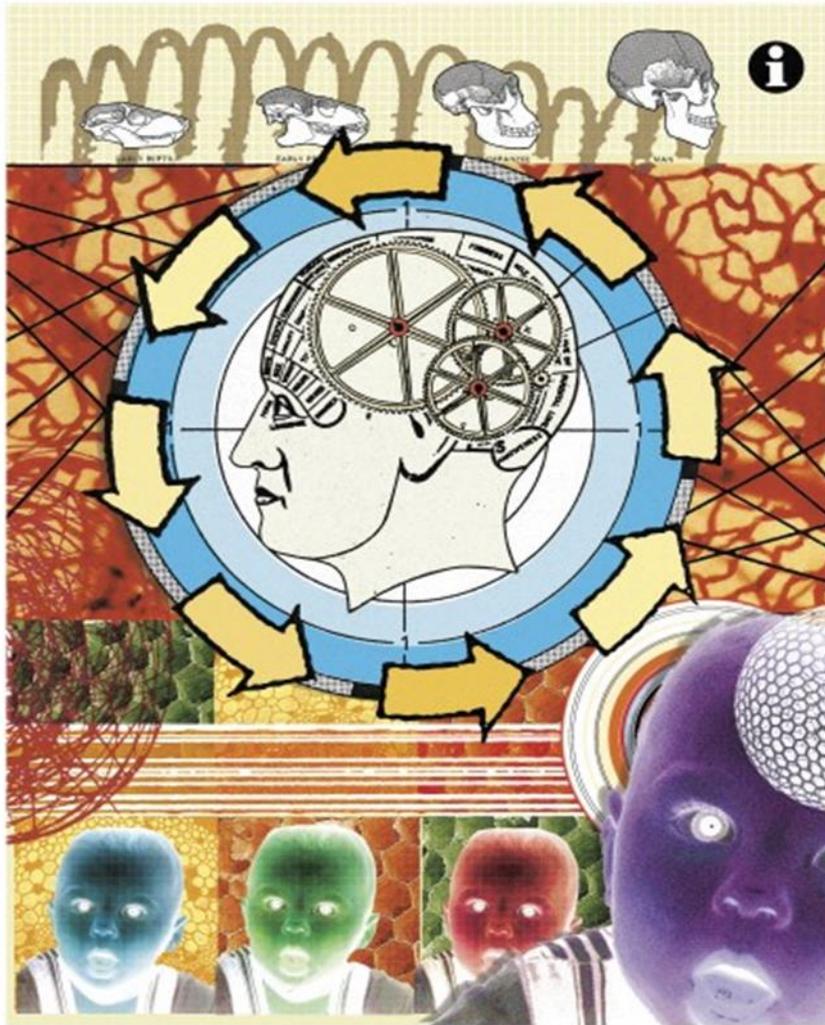
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**1. Exclusion from remit of Act**

**2. Overlapping tests for capacity**

**3. Capacity v authority**

# Minors



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*Gillick v West Norfolk Area Health Authority* – understand fully what is proposed.

Distinction between consent and refusal.

UN Convention on the Rights of the Child – empowering ethos

# Mental Disorder

Mental Health Act:  
treatment without  
consent if risk to  
others *or to self*.

UN Convention on  
the Rights of  
Persons with  
Disabilities



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Art 5: equality  
before the law  
Art 12:  
capacity on an  
equal basis  
Art 17: right to  
liberty  
Art 25:  
informed  
consent

# Keeping up with change



Law Comm 1995: “It does not rest on clear or modern foundations of principle. It has failed to keep up with social and demographic changes”

Illustration by a looking lot.

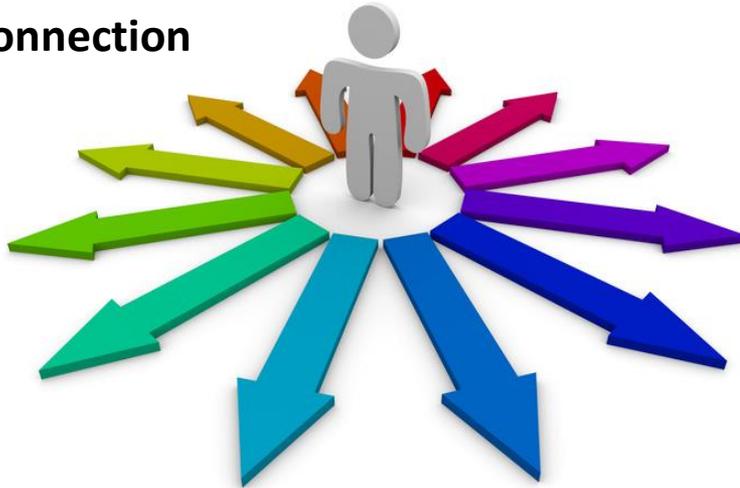
The very young child may not remember or fully understand all you have tried to tell him. He will be helped most of all by your repeated visits and by having his favourite toy to remind him of home.

Wellcome Images

Wellcome Images

# Should we 'mind the gaps'?

**Complexity**  
**Coherence**  
**Connection**



Overlap of laws and regimes causes difficulties for patients, families and healthcare professionals.



Effect on implementation agenda

## Solutions? Minors



Presumption of consent extended to children.

# Solutions? Mental disorder

## Disability neutral supported decision making:

- Bach and Kerzner
- Northern Ireland Mental Capacity Bill
- Gooding and Flynn

'A situation of serious adverse effects occurs when a person's life, health or safety is at imminent and grave risk, **and failure to intervene would constitute criminal or civil negligence.**'



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- Supported decision making
- Fused MH / MC laws
- Necessity

Focus should be on framework as a whole:

-Doctors, decision makers, patients – not just judges.

-Consistency across medical specialties– mental disorder, paediatrics, geriatrics etc

Can we still view the MCA as a progressive, liberal framework given advances in human rights and non discrimination?

Are there grounds for involuntary medical treatment which are non-discriminatory?

Radical reform, or fusion by stealth?