Minding the Gaps

The Mental Capacity Act, Children and Mental Health

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

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

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

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

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.”
The MCA: a ‘single comprehensive piece of legislation making provisions for people who lack capacity’

U16s – Gillick competence


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’
Minors

*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

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

Effect on implementation agenda

Should we ‘mind the gaps’?

Complexity
Coherence
Connection
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.’

- 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?