

The (dread) MHA / MCA interface

August 2023

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Always remember the context

- Neither the MHA nor the MCA explain **why** you are doing what you are doing, they explain **how** you can do what you need to do
- Why you need to act (or not act) always has another basis – from legal perspective, most often the Human Rights Act 1998:
 - Human rights as a balancing exercise – positive duties vs negative obligations:
<https://www.bihhr.org.uk/get-informed/where-do-organisations-duties-apply/health-care-social-work>
 - And from the individual's perspective, the State is indivisible
- And in most cases people will be operating in conditions of uncertainty: the critical question is how to use that uncertainty justly (and what systems can do to support that): see this [briefing](#)

The MHA and the MCA 2005: the key differences

1. The MCA 2005 relates to a person's **functioning**; the MHA 1983 relates to a person's **status**
2. The MCA 2005 requires acts done or decisions made under the Act on behalf of persons who lack the requisite capacity to be done or made in their **best interests**. No such equivalent in the MHA 1983 => an individual can (for instance) be detained solely on the basis of the risk that they pose to others.
3. The MCA 2005 covers **all decision-making**, whereas the MHA 1983 is, to a very large degree, limited to decisions about **care in hospital and medical treatment for mental disorder**.

The overlaps

1. Detention under MHA 1983 does not exclude operation of MCA 2005 in relation to e.g. medical treatment for physical disorder or management of their property and affairs.
2. Inpatient hospital settings: deprivation of liberty – ‘DOLS’ under the MCA 2005 or detention under MHA 1983?
3. Outside the hospital: the ‘community’ provisions of the MHA

The policy underpinnings of Sch 1A

- Inpatient:

The Government's policy intention was that people who lack capacity to consent to being admitted to hospital, but who are clearly objecting to it, should generally be treated like people who have capacity and are refusing to consent to mental health treatment. If it is considered necessary to detain them in hospital, and they would have been detained under the MHA if they had the capacity to refuse treatment, then as a matter of policy it was thought right that the MHA should be used in preference to the MCA. *DN v Northumberland, Tyne and Wear NHS Foundation Trust* [2011] UKUT 327 (AAC)

- Community: no equivalent statement, but MCA and MHA Codes emphasise parallel authorisation

Sch 1A on one page

- P is eligible for DOLS under MCA 2005 **unless**:
 - He is detained under MHA ss 2, 4, 3, 35, 36, 37, 38, 44, 45A, 47, 48, or 51 (Case A); OR
 - He is subject to s.17 leave or conditional discharge (Case B), or CTO (Case C), or guardianship (Case D), and DOLS detention would be incompatible with a MHA requirement; OR
 - He could be detained under MHA ss2 or 3 and is an “objecting” “mental health patient” (Case E)

The interface – the inpatient settings

Case A

- Subject to 'hospital treatment regime' (MHA ss 2, 4, 3, 35, 36, 37, 38, 44, 45A, 47, 48, 51) and detained
- Cannot use DOLS
- *A NHS Trust v Dr A* [2013] EWHC 2442 (COP): Deprivation of liberty of detained patient for treatment of physical disorder

Case E – within the scope of the MCA

1. Is the person a ‘mental health patient’?
2. Is the person an ‘objecting’ mental health patient’?
3. Could the person be detained under the MHA?

If **yes** to all – cannot use the MCA

If **no**, then can use the MCA

- *GJ v Foundation Trust* [2009] EWHC 2972
- *AM v SLAM* [2013] UKUT 365
- *Manchester University Hospital NHS Foundation Trust v JS & Others (Schedule 1A Mental Capacity Act 2005)* [2023] EWCOP 33

And beyond deprivation of liberty

- Are we getting fusion between mental health and mental capacity legislation by the back door?
- *Nottinghamshire Healthcare NHS Trust v RC* [2014] EWCOP 1317: advance decision to refuse treatment and s.63 MHA 1983
- *A NHS Foundation Trust v Ms X* [2014] EWCOP 35: non-admission under the MHA in patient's best interests
- *Cambridge University Hospitals NHS Foundation Trust & Anor v RD & Ors* [2022] EWCOP 47: endorsement of treatment plan in the context of a person repeatedly cutting their own throat and removing tracheostomy tube

The interface – community settings

Case B – conditional discharge

- Subject to, but not detained under, 'hospital treatment regime' (MHA ss 2, 4, 3, 35, 36, 37, 38, 44, 45A, 47, 48, 51)
- Can use DOLS if not incompatible with MHA
- NB perverse incentive to find lack of capacity? *Secretary of State for Justice v MM* [2018] UKSC 60 and *Birmingham City Council v SR* [2019] EWCOP 28
- HM Prison and Probation Service, 'Mental Health Casework Section: Guidance: Discharge conditions that amount to deprivation of liberty' (January 2019): *DB v Betsi Cadwaldr University Health Board (Mental health)* [2021] UKUT 53
- Getting ducks in a row wearing the right hats: *MC v Cygnet Behavioural Health Ltd and the Secretary of State for Justice* [2020] UKUT 230 (AAC)

Case B – s.17 leave

- **Can** have parallel s.17 leave and DoLS (or court order), e.g.
 - Leave is granted to a hospital for treatment of a physical disorder: *Re A* [2015] EWCOP 71
 - Trial placement (or extended) placement in care home / supported living placement
- **Must** there be parallel authorisation? Current MCA/MHA Codes of Practice suggest that this is the case
 - But White Paper: “[w]e agree also that dual authorisation under section 17 of the act and DoLS/LPS should not be needed and will clarify in the Code of Practice that this should be the expected approach.”
 - ? Only where s.17(3) is in play – i.e. the person is placed in custody

Case C - CTOs

- Subject to ‘community treatment regime’ (ie CTO)
- *Welsh Ministers v PJ* [2018] UKSC 66: no power in MHA to impose conditions on CTO amounting to confinement
- Same approach to CTOs as to conditional discharge:
<https://www.mentalcapacitylawandpolicy.org.uk/ctos-and-community-deprivation-of-liberty-some-welcome-clarity/> (and also, by implication, *Sunderland City Council v AS & Ors* [2020] EWCOP 13)

Case D – guardianship

- Guardianship cannot authorise deprivation of liberty
- Can use DOLS if not incompatible with MHA: *KD v A Borough Council & Ors* [2015] UKUT 251 (AAC)
- See also *AB (Deprivation of Liberty)* [2020] EWCOP 39

More resources

- [39 Essex Chambers | Mental Capacity Law | 39 Essex Chambers | Barristers' Chambers](#)
- [Mental Health & Justice | \(mhj.org.uk\)](#)
- [Mental Capacity Law and Policy](#)
- [MCA Directory | SCIE](#)
- [Mental Health Law Online](#)

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