The MHA and MCA; different ethical approaches
Why make the argument?

- Difficulties which we see in the classroom when AMHPs undertake BIA training or BIAs undertake AMHP training
- Want to make the argument that one of the difficulties candidates experience is that the legislation which they are used to working under had a different ethical approach/philosophy.
- The focus is on the legislation not the excellent work which many practitioners engage in
Consequentialist or Deontological approaches?

Consequentialist

- ‘Consequentialist theories judge the morality of the action based on the consequences or outcomes of those actions’ (Morgan et al (2016)).
- The end justifies the means
- Stronger focus on benevolence and paternalism

Deontological

- ‘Deontological theories assess the morality of the actions based on the motivation for action’ (Morgan et al, 2016, page 10)
- The means justify the end
- Strong focus on autonomy
The Mental Health Act 1983, a consequentialist approach?

**Origins:** Lie with MHA 1959 which repealed all existing legislation dealing with mental illness and mental deficiency.

Note that this is pre Human Rights Act, pre Equality Act, pre ECRPD and pre Mental Capacity Act.
Key quotes prior to the 2007 MHA

Green paper; reform of MHA 1983: ‘it is the degree of risk that patients with mental disorders pose, to themselves or others that is crucial to the decision on whether a patient should be made subject to a compulsory order. In the presence of such risk, questions of capacity – while still relevant to the plan of care and treatment – may be largely irrelevant to the question of whether or not a compulsory order should be made’ (p32).

White paper (2000); reforming the Mental Health Act: ‘Concerns of risk will always take precedence but care and treatment provided under formal powers should otherwise reflect the best interests of the patient.’
Powers of the Mental Health Act; detention

- Compulsory detention irrespective of capacity
  - In the legislation assessors do not have to consider views, wishes, feelings, beliefs or values of the patient.

- Criteria for detention have to meet three grounds in relation to risk; risk to self, risk to health or risk to others

- Detention for treatment can be renewed indefinitely so long as the criteria for renewal apply
  - Albert Haines, detained Broadmoor 1986. Length of detention has far exceeded tariff for crime in criminal justice
Powers of the MHA; treatment

- Compulsory treatment (with limited safeguards at three months)
- No rights to appeal treatment
- Broad definition of treatment (with no statutory safeguards for treatment which falls outside of S57, S58 and S58a)
Powers of the Act; community

Community powers (Community Treatment Orders (CTOs), guardianship and S17 leave) which between them can:

- Make people who live in the community attend places for treatment, education and training (Guardianship)
- Make people who live in the community let mental health professionals into their homes (Guardianship)
- Tell people that they have to live in a certain place (not hospital) (S17 leave and guardianship)
- Recall people to hospital for treatment (CTOs)
- Subject people to other conditions (CTOs)
Mental Health Act Code of Practice, the guiding principles

Contain hints of an outcome focused approach:

☐ 1.4…’This will promote recovery and enable the patient to maintain contact with their family, friends and community.’

☐ 1.16…’Practitioner should deliver a range of treatments which focus on positive clinical and personal outcomes, where appropriate.’
Guiding Principles and VB Assessment

- Mental Health Act 2007
- Code of Practice
- Training materials
TRAINING MATERIALS TO SUPPORT IMPLEMENTATION OF THE AMENDING BILL TO THE MENTAL HEALTH ACT 1983

FOUNDATION MODULE

SUMMARY
PART ONE: INTRODUCTION TO THE MODULE
PART TWO: THE SEVEN KEY CHANGES
PART THREE: THE ROLE OF THE CODE OF PRACTICE AND THE FUNDAMENTAL PRINCIPLES
PART FOUR: PUTTING IT ALL TOGETHER
REFERENCES AND FURTHER READING
AUTHORS AND ACKNOWLEDGEMENTS

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Values-based practice and using the Mental Health Act

- The law – tells us what to do
- The Code of Practice – tells us how to do it
- The Guiding Principles – tells us how to apply the law and Code of Practice to the diversity of individual cases
The Guiding Principles as a Framework of Values
The Mental Health Act and Practice

- A range of restraints including seclusion and mechanical restraint (Guidance provided in the code of practice)
- Lack of beds and excessive distance that patients are travelling (especially children)
- Excessive use of blanket rules (CQC report)
- Significant academic arguments about the validity and usefulness of psychiatric diagnosis (British psychological association)
- Increased mortality rate (CQC report)
Value hot spots

- Assessment
  - Guiding Principles
- Admission and whether the criteria are met
  - Admission to an unknown bed
  - Admission to an out of area bed
- Giving treatment by force
- Discharge into community treatment
The Mental Capacity Act

- Previous legal context was incoherent and inconsistent and involved case law and the doctrine of necessity.
- Human Rights Act and ECRPD pre-date MCA (although ECRPD was not ratified in UK until 2009).
- Lord Falconer when explaining the Bill: ‘The Bill seeks to do six main things. First it allows adults to take as many decisions as they can for themselves and, in any event, to put them at the centre of the decision making process about themselves….’
The MCA; powers, assessment

- Guiding principles in the statute (S1)
  - Presumption of capacity
  - All practicable steps
  - Unwise decisions

- Framework for undertaking capacity assessments
  - Consider risk but only risk to individual
  - Clarity that capacity is decision and time specific
MCA powers; best interests decisions

- Only relates to those who lack capacity to make decisions for themselves
- Consideration of a less restrictive alternative
- Checklist for making a best interests decision for someone who is unable to make that decision for him/herself
  - Includes consideration of P’s wishes, feelings, beliefs and values
  - But no guidance on how much weight the above should have
MCA other powers

- Legal framework for advance decision to refuse treatment
- Introduces Lasting Power of Attorneys for health and welfare and; property and affairs
- Introduces Independent Mental Capacity Advocates
- Authorises the use of restraint in certain circumstances
- Focuses on harm to self rather than to others
- Court of protection
MCA Practice

Court decisions around capacity assessments and best interests decisions. Range of outcomes:

- Woman deemed to have capacity to make a decision about where to reside; she went home even though there were considerable concerns about her health and safety (STCC, CC and KK)

- It is not in the best interests of a woman with anorexia to be given treatment under coercion even if the lack of treatment means that she will die (re X)

- It is in a man’s best interests to receive care in accommodation which clearly does not meet his needs (in the absence of alternatives) re MAG

- It is in a man’s best interests not to have a gangrenous foot removed even though he will die without the treatment
MCA value hotspots

- Assessing capacity
  - Unwise decisions; are they (or are they not) evidence that there may be a lack of capacity
  - The functional test, in particular ‘use or weigh’
  - Establishing the causative nexus
- Making best interests decisions especially when there is conflict.
Summary

Consequentialist

Mental Health Act

Deontological

Mental Capacity Act
During lunch:

☐ Evaluate this piece of advice:

‘Start by working out what is the right thing to do and then work out a legal route to get there’.