

Mental Capacity Act 2005 (MCA)

Pocket Guide

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Every adult has the right to make their own decision if they have the capacity to do so.

The MCA provides the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make a particular decision at a particular time.

The MCA applies to all people over the age of 16.

Decisions made within the framework of the MCA are decision specific and time specific.

There is a code of practice providing guidance to follow the law.

The 5 statutory principles of the act

A person must be assumed to have capacity unless it is established that they lack capacity.

A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken.

A person is not to be treated as unable to make a decision just because they make an unwise decision.

An act done or decision made under the MCA for a person who lacks capacity must be in their best interest.

Must be the less restrictive option.

Capacity is assessed by a two stage test

The first stage is the functional test.

This is a four part test.

Is the person able to:

Understand the information relevant to the decision?

Retain that information long enough to make a decision?

Use or weigh up the information relating to the decision?

Communicate the decision?

The second stage is the diagnostic test.

Does the person have impairment of the mind or brain and does the difficulty making a decision arise from this? (Causative Nexus).

Best Interests Decision

This happens after a capacity assessment has found the person is not able to make the decision.

Many different people will be required to make decisions under the act and who the decision maker is depends on the type of decision to be made.

For example a decision about medical treatment would be made by a medical practitioner.

Section 4 MCA provides a best interests checklist of factors which must always be considered when trying to work out someone's best interests. Delay the decision if there is a chance the person will regain capacity to make the decision and it can be delayed.

Best Interests Checklist

Enable the person who lacks capacity to take part in the decision.

Take account of the person's past and present wishes, feelings, beliefs and values.

Consult with other people close to the person including any attorney or deputy.

Consider whether there are less restrictive options.

Avoid discrimination.

Consider all relevant circumstances.

Delay the decision if there is a chance the person will regain capacity to make the decision and it can be delayed.

Lasting Power of Attorney (LPA)

Anyone over the age of 18 can formally appoint another person (as long as both people have capacity to do so) as their attorney. This grants legal powers to the attorney to deal with the person's affairs if they lose capacity.

There are two types of LPA

Health and welfare - the attorney has the legal power to make decisions about the health and welfare needs of the individual who lacks capacity.

Property and financial affairs - the attorney has the legal power to make decisions about managing the financial affairs of the individual who lacks capacity.

What is DoLS?

DoLS is the Deprivation of Liberty Safeguards. A DoLS authorisation can be requested by a hospital or a care home. This 'managing authority' can request an urgent authorisation when someone in their care is felt to already be deprived of their liberty or a standard authorisation when this situation is anticipated.

Referrals should be sent to: DOLS@wokingham.gov.uk

Eligibility for DoLS is determined by 6 assessments:

Age - must be over 18.

Mental Health - must have a mental disorder as defined in S1 Mental Health Act 1993 (MHA).

Capacity - must lack capacity to consent to the care arrangements.

Eligibility - a person is not eligible when they fall within certain provisions of the MHA 1983.

No refusals - an authorisation must not conflict with decision of LPA or deputy.

Best interests requirement must be met.

What is a Deprivation of Liberty?

Deprivation of Liberty is not defined in statute, it has been developed through case law. The Acid Test came from Cheshire West [2014] and sets out the 3 conditions for those lacking capacity to consent which must exist for a person to be deemed deprived of their liberty:

They are subject to continuous supervision and control; and

Not free to leave the place in which they are detained; and

The care and treatment being received is imputable to the state (responsibility of the state to provide). The Best Interests Assessor (BIA) will consider all the restrictions and whether these amount to continuous supervision and control.

‘Free to leave’ is not whether a person seems to be wanting to leave, but if they would be stopped if they did want to leave and not return.

Restraint

Restraint is one of the restrictions that the BIA will consider overall in their assessment as to whether there is a deprivation of liberty and if it is in their best interests.

MCA Section 6(4) states that someone is using restraint if they:

Use force or threaten to use force to make someone do something they are resisting.

Restrict a person's freedom of movement whether they are resisting or not.

Restraint is appropriate under the MCA when:

The decision maker believes that it is necessary to restrain the person in order to prevent them from being harmed; and there is evidence that restraint is a proportionate response to the likelihood and seriousness of harm.

The Best Interests Assessment

This is the longest assessment; the BIA (Best Interests Assessor) is required to consider all of the factors in the Best Interests Checklist to reach a conclusion as to whether the deprivation is in the person's best interests. A balance sheet could be used to assist with the decision.

While objection is not relevant to whether the person is deprived of their liberty, it is of relevance as to whether it is in the person's best interests.

The BIA has to consider whether the current care arrangements are the less restrictive, including whether an alternative setting could be less restrictive or whether the restrictions in the existing placement could be reduced.

A Relevant Person's Representative (RPR) is appointed, providing a safeguard to facilitate any appeal.

CoP DoLS

There are some care settings where an individual may be deprived of their liberty where DoLS does not apply. These can include domestic settings, extra care housing and supported accommodation.

In these cases, where a person is found to be deprived of their liberty and this is considered to be in their best interests, an application must be made to the Court of Protection.

The arrangements locally include the worker completing a the Deprivation of Liberty Screening Tool and if the outcome is identified as “High Priority”, the application will proceed to the Court of Protection. Please refer to the WBC Deprivation of Liberty in Community Settings Guidance.

Advocacy

There is a statutory right to an independent mental capacity advocate (IMCA) for DoLS.

Section 39A - where there is no suitable non-professional to consult during the DoLS assessment.

Section 39C - where the person ceases to have a relevant person's representative.

Section 39D - where an advocate has been identified as necessary to support the person's right of appeal.

There is a statutory right to advocacy in other circumstances where there is no one with whom to consult, these include: provision of serious medical treatment, change of accommodation and safeguarding.

The Advocacy People provide the IMCA service to Wokingham. Referral forms can be found at:

www.theadvocacypeople.org.uk

Call: 0330 440 9000

Email: info@theadvocacypeople.org.uk

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