Mental Capacity Act

Quick Reminder Guide

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Walsall Council

The Mental Capacity Act 2005 (MCA) and the Deprivation of Liberty Safeguards (DOLS) contained within, provide a fundamental safeguard for Human Rights (HRA, 1998).

The MCA also provides a legal framework to enable persons over 16 to make their own decisions.

The principles

Applying the five principles that underpin the Mental Capacity Act 2005

A fundamental aim of this Act is to ensure that individuals who lack capacity are able to take part in decisions that affect them and that all reasonably practicable steps should be taken to achieve this. To that end, the following statutory principles must be applied in order to protect the rights and the voice of the person:

1. You must always assume a person has capacity unless you can establish that they do not (that is, for the decision that needs to be made at the time it needs to be made).

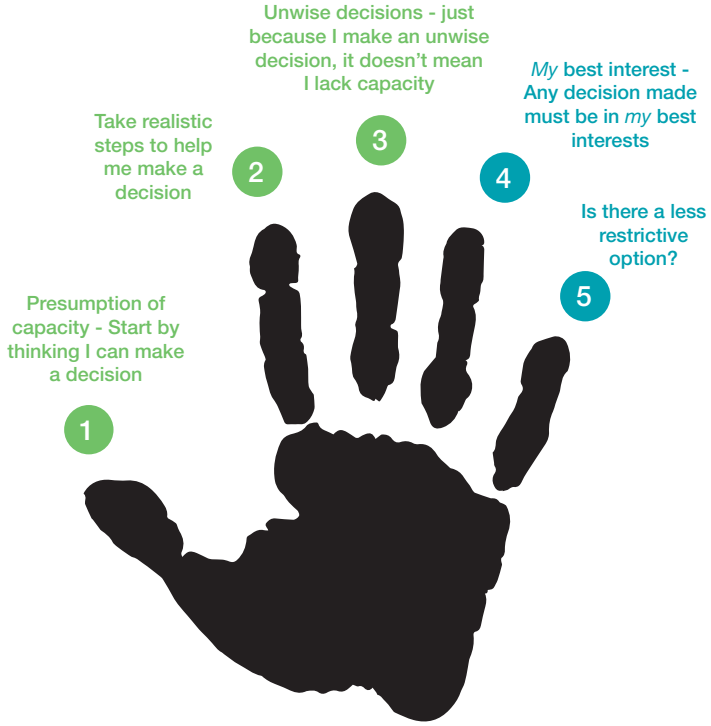
2. You must take all practicable steps to enable people to make their own decisions, before you can consider making a decision for them.

3. You must not assume incapacity merely because someone makes an unwise decision.

4. Where a person does not have capacity you must always act in their best interests.

5. You must ensure that any proposed action or decision taken under “best interests” is the least restrictive option in all the circumstances.

People who lack Capacity



(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to—

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

(5) No power which a person ("D") may exercise under this Act—

(a) in relation to a person who lacks capacity, or

(b) where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16.

(6) Subsection (5) is subject to section 18(3).

Applying the Test of Capacity

Refer to the five principles of the MCA:

1. Assume a person has capacity
2. Support the individual to make their own decision
3. Someone may make an unwise decision
4. Always act, or decide, for a person without capacity in their best interests
5. Choose the least restrictive option

The two-stage capacity test:

Stage one. Is there an impairment of, or disturbance in the functioning of the person's mind or brain? If so,

Stage two. Does the impairment or disturbance impede the person's capacity to make the particular decision?

Can the person:

- Understand the information relevant to the decision,
- Retain that information,
- Weigh that information as a part of the process of making a decision and
- Communicate their decision (whether by talking, using sign language or any other means)?

(Person must demonstrate all four functions above to be deemed as having capacity for the required decision-making.) Record this!

The Act requires professionals to help and support people to make their own decisions.

This is called supported decision making, where professionals spend time to help people understand the options and the consequences of their choices.

Where there is evidence that a person may lack capacity for a particular decision, the two-stage test for capacity must be followed.

- **Stage one:** Does the person have an impairment of or disturbance in the functioning of their mind or brain (temporary or permanent)?

– If no, the person will have capacity. If yes, move to Stage two:

- **Stage two:** Is the person at the time the decision needs to be made able to:

– Understand the information relevant to the decision

– Retain that information (for as long as needed to take the decision)

– Communicate their decision by any means (such as speech or sign language)

– Communicate their decision by any means (i.e. speech, sign language)?

Relevant information is only what is needed to help the person understand the decision.

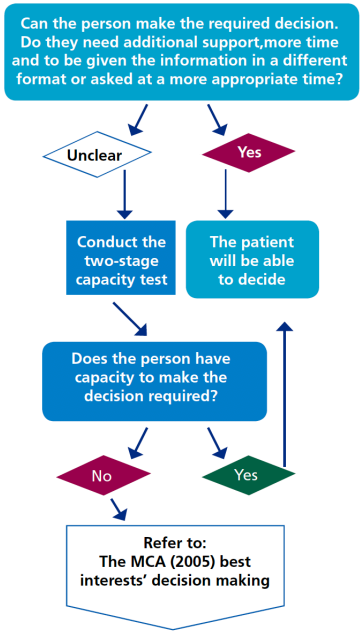
- the nature of the decision,
- the reason it is needed
- and the consequences of making it or not making it.

If the person fails on one or more points of the stage-two test this determines that they lack capacity for the decision in question.

If there is more than one decision to be made, each decision should be assessed separately.

MCA (2005) decision-making flowchart

All adults should be presumed to have capacity unless an assessment of capacity has shown that a person does not in line with the MCA. If the patient is capable, consent must be obtained by the person undertaking the procedure.



Best Interests

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—

(a) the person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any done of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—

(a) are exercisable under a lasting power of attorney, or

(b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

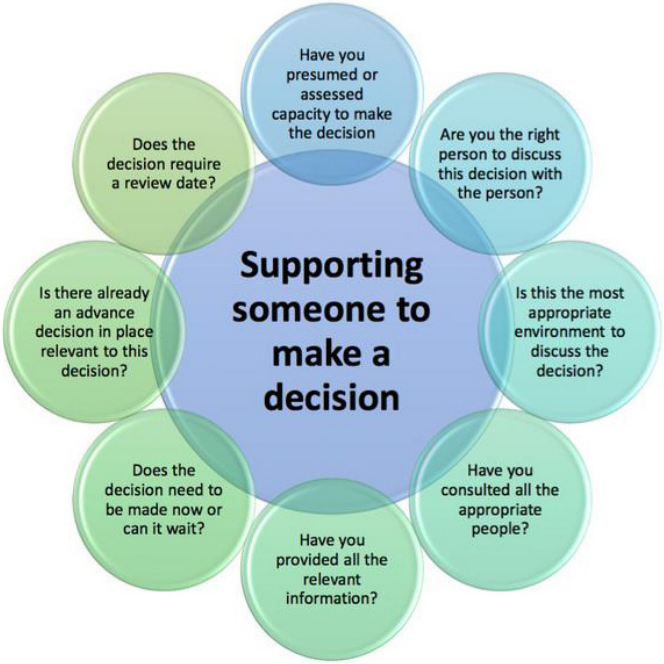
(10) "Life-sustaining treatment" means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.

(11) "Relevant circumstances" are those—

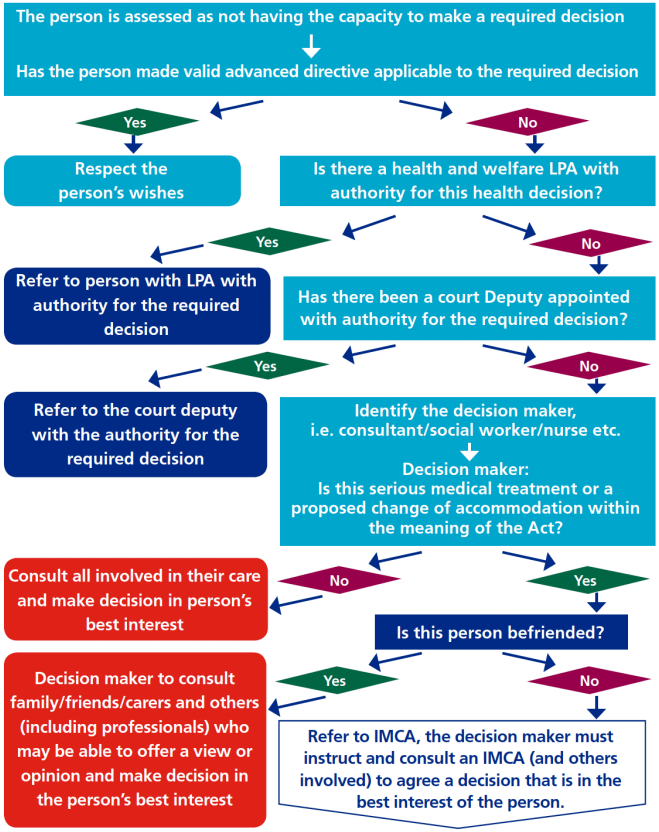
(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.

A person may need support to make some decisions



MCA (2005) Best-interests decision-making flowchart



Decision Makers

The more complex or important the best interest decision - the wider the involvement and the more detailed the recording.

Who makes the best interest decision?

- Could be the person wishing to carry out an action connected with care
- An LPA
- A Court appointed deputy
- The Court of Protection

The decision maker:

- Must ensure that the proposed action/treatment is in the best interests of the person
- The decision maker needs to check if there is no Advance Statement Directive (ASD), Lasting Power of Attorney [LPA] or Deputy, or if there is a friend/carer of person nominated by the person to consult.
- The ASD must be relevant to this decision.

Record keeping:

- It is important that you accurately record and evidence any decisions made with regards to best interest.

Mental Capacity Act sets up the IMCA's as a statutory service to help people who lack capacity and who have no one else (other than paid staff) to support them, and are facing important decisions, such serious healthcare treatment or change of accommodation. However practitioners should also consider whether an IMCA or other advocate might be helpful to assist an incapable person in other circumstances when a best interest's decision or action is being planned. The MCA specifies that an Independent Mental Capacity Advocate (IMCA) must be appointed before a decision is made regarding:

- Serious medical treatment.
- NHS accommodation (or change in accommodation) for 28 days or more or in a care home for 8 weeks or more.
- Local Authority arranged accommodation for 8 weeks or more, except in an emergency. The duty to consult with an IMCA applies where there is no one else for the decision

Independent mental capacity advocate (IMCA)
IMCAs are a statutory safeguard for people who lack capacity to make some important decisions. This includes decisions about where the person lives and serious medical treatment when the person does not have family or friends who can represent them. IMCAs can also represent individuals who are the focus of adult protection proceedings. The Deprivation of Liberty Safeguards introduced further roles for IMCAs.

Deprivation of Liberty Safeguards (DOLS)

The Deprivation of Liberty Safeguards regime provides a legal framework for hospitals and care homes to lawfully deprive patients or residents in their care of their liberty, it is deemed to be in the best interest and meets all relevant assessment criteria. It also ensures that people are deprived of their liberty only when there is no other way to care for them or safely provide treatment in a less restrictive way. DOLS exists to protect people's human rights, where levels of restriction or restraint are applied to such a degree so as to be impacting upon the person's liberty.

For those in supported living or their own home, the DOLS framework does not apply as such and an application should be made directly to the Court of Protection.

DOLS consideration in assessing whether an incapacitated person is deprived of their liberty, the focus should be on:

- Is the patient under constant supervision and control? AND
- Is the patient not free to leave
- What is their objective situation overall?

Note that irrelevant factors are:

- An incapacitated person's compliance or lack of objection.
- The purpose or relative normality of the placement.

Applications for standard authorisations for deprivations of liberty are made to the Local Authority where the person is ordinarily resident as the lawful Supervisory Body. The Local Authority undertakes the prescribed assessments before deciding if the DOL can be authorised.

If a person is considered to be deprived of their liberty before the supervisory body can respond to a request for a standard authorisation, a hospital or care home can implement an urgent authorisation themselves for a short period (initially up to 7 days). In all cases where a DOLS authorisation is implemented, it should be in place for no longer than is necessary.

Who do they apply to?

DOLS apply to:

- individuals who are over 18 year of age; and
- who lack capacity; and
- are deprived of their liberty in either hospital or a registered care home.

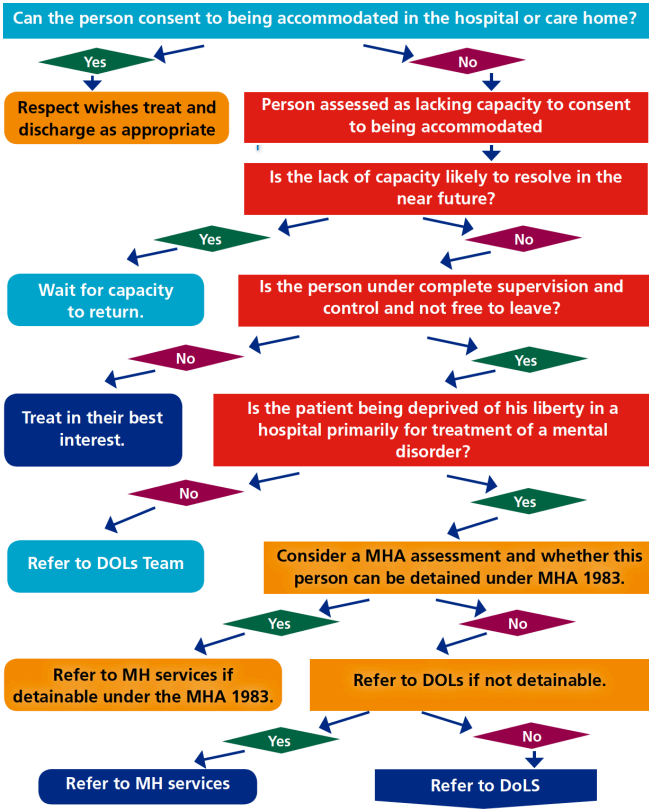
Mental Health Act 1983

If any patient is subject to the formal provision of the MHA then this is a legal basis for depriving that person of their liberty.

If a person is being deprived of their liberty and they are not in a care home or hospital (but under the care of the state), a DOLS is not applicable, and any deprivation of liberty should only be authorised through the Court of Protection.

Lead or Local Authority MCA and DOLS Lead for further information.

Deprivation of Liberty Safeguards (DOLS) decision-making flowchart



What is the difference between a restriction and a deprivation of liberty?

A restriction or restrictions do not always mean that a person is being deprived of their liberty. But note that if a person is subject to continuous supervision and is not free to leave then they will require the protection provided by the DOLS Safeguards

Practitioners should review the range and level of restrictions (including restraint) on the person on a regular basis and where possible reduce, amend or remove the restrictions that are in place (applying the “least restrictive” principle)

Practitioners will need to consider all the factors in the individual situation of the person concerned who is subject to restrictions to decide if they might amount to a deprivation of liberty. In practice, this will include consideration of:

- The intensity and degree of the restriction or restrictions in place
- The circumstances, totality and nature of the restriction or restrictions in place
- Whether there are significant restrictions on the person’s contact with family, friends or the outside world
- The level of supervision and control including ,whether it is continuous and if a person is not free to leave
- Whether people (staff, carers or family members or the individual) disagree with the current detention and/or level of restrictions

In considering if a person is deprived of their liberty, the incapacitated person's compliance or lack of objection, and the apparent appropriateness of the placement or whether it appears to be in their best interests is irrelevant and must not be taken into account.

Where an incapacitated person is subject to continuous supervision and control by staff and is not free to leave, then practitioners need to be mindful of relevant recent Court Judgements and take advice from their organisations' Mental Capacity Act/DOLS Lead.

What should you do if you are concerned a person is being deprived of their liberty?

Practitioners are not expected to be experts on what is and is not a deprivation of liberty. They do need to know that if they are concerned that a person might be deprived of their liberty, and they must take action to ensure that this is considered by the appropriate authorised person in their organisation.

Therefore, if you have considered and acted to minimise the restrictions on the person and you are still concerned about a possible deprivation of liberty, you should:

- Act quickly to ensure you comply with legislation and your duties of care
- Discuss the case with your manager or authorised person for DOLS
- DOLS and/or Adult Safeguarding Lead if required
- Seek advice from your local authority DOLS team or supervisory body office if needed

Liberty Protection Safeguards

In May 2019 the Mental Capacity (Amendment) Bill, passed into law replacing the Deprivation of Liberty Safeguards (DOLS)

Key features:

- Start at 16 years old.
- Deprivations of liberty have to be authorised in advance by the 'responsible body' (NHS hospitals - 'hospital manager'. Continuing Health Care outside of a hospital, the 'responsible body' will be their local CCG (or Health Board in Wales). In all other cases – such as in care homes, supported living schemes etc. (including for self-funders), and private hospitals, the responsible body will be the local authority.
- For the responsible body to authorise any deprivation of liberty, it needs to be clear that:
    - The person lacks the capacity to consent to the care arrangements
    - The person has a mental disorder
    - The arrangements are necessary to prevent harm to the cared-for person, and proportionate to the likelihood and seriousness of that harm.
- An individual from the responsible body, but not someone directly involved concludes if the arrangements meet the three criteria above (lack of capacity; mental disorder; necessity and proportionality).

- Where it is clear, or reasonably suspected, that the person objects to the care arrangements, then a more thorough review of the case must be carried out by an Approved Mental Capacity Professional.
- Safeguards once a deprivation is authorised include regular reviews by the responsible body and the right to an appropriate person or an IMCA to represent a person and protect their interests.
- As under DOLS, a deprivation can be for a maximum of one year initially. Under LPS, this can be renewed initially for one year, but subsequent to that for up to three years.
- The Court of Protection will oversee any disputes or appeals as with DOLS.

  The new Act can authorise a DOLS in a medical emergency, without gaining prior authorisation.

The target date for implementation is October 2020

Where to find guidance

MCA is available at

http://www.legislation.gov.uk/ukpga/2005/9/contents

MCA Code of Practice at

www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf

Social Care Institute for Excellence:

http://search.scie.org.uk/?q=mental%20 capacity%20act

Office of the Public Guardian website:

http://gov.uk/office-of-public-guardian

Court of Protection:

Email: courtofprotectionenquiries@hmcts.gsi.gov.uk

Telephone 0300 456 4600

Please note that this guide is underpinned by the Mental Capacity Act 2005 and the DOLS Regulations

Resources used to create these prompt cards were from:

NHS England MCA prompt Cards (2014)
SCIE - DOLS Quick Guide
MCA 2005 on the Parliamentary Website

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