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**“Working to Empower the Community”
in Lancashire and Cumbria**

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Community
Legal Service



Help Point

Mental Capacity Act 2005 (MCA) and Deprivation of Liberty Safeguards (DOLS)

Extracts from:

- **North Lancashire PCT - policy for the implementation of MCA;**
- **Office of the Public Guardian – Making Decisions a guide for advice workers;**
- **Office of the Public Guardian - Making Decisions a guide for health and social care workers.**

Introduction:

The Mental Capacity Act 2005, covering England and Wales, was fully implemented in October 2007 and provides a statutory framework for people who lack capacity to make decisions for themselves, or who have capacity and want to make preparations for a future time when they may lack capacity.

The Mental Health Act 2007, which received Royal Assent in July 2007, included an amendment to the Mental Capacity Act to introduce additional Deprivation of Liberty Safeguards, which come into effect on 1st April 2009. The legal framework is supported by the Mental Capacity Act Code of Practice (Department for Constitutional Affairs 2007), and the Mental Capacity Act Deprivation of Liberty Safeguards Code of Practice (Ministry of Justice 2008), which provide guidance and information about how the Act should be interpreted.

Scope:

This policy applies to all staff employed, volunteering or on student placement at Signposts. The act applies to everyone over the age of 16, and covers decisions about finance, social care, medical treatment and research, as well as every day living decisions. There are some aspects of the Mental Capacity Act that only apply to people aged 18 or over refer to Codes of Practice (DCA 2007; MoJ 2008) for further information.

All staff must comply with their statutory duty to implement the Mental Capacity Act 2005 and apply the supporting Codes of Practice (DCA 2007; MoJ 2008). In fulfilling this duty, staff must work in partnership with the person concerned, other agencies, informal carers, family and friends.

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Definition of Capacity:

Having mental capacity means that a person is able to make their own decisions. The Mental Capacity Act says that a person is unable to make a particular decision if they cannot do one or more of the following four things:

- Understand information given to them.
- Retain that information long enough to be able to make the decision.
- Weigh up the information available to make the decision.
- Communicate their decision - this could be by talking, using sign language or even simple muscle movements such as blinking an eye or squeezing a hand.

We all have problems making decisions from time to time, but the Mental Capacity Act is about more than that. It is specifically designed to cover situations where someone is unable to make a decision because the way their mind or brain works is affected, for instance, by illness or disability, or the effects of drugs or alcohol.

A lack of mental capacity could be due to:

- a stroke or brain injury;
- a mental health problem;
- dementia;
- a learning disability;
- confusion, drowsiness or unconsciousness because of an illness or the treatment for it;
- or substance misuse.

What decisions are covered by the act:

The type of decisions that are covered by the MCA range from day-to-day decisions such as what to wear or eat, through to more serious decisions about where to live, having an operation or what to do with a person's finances and property.

Decisions that are not covered by the MCA:

Some types of decisions (such as marriage or civil partnership, divorce, sexual relationships, adoption and voting) can never be made by another person on behalf of a person who lacks capacity. This is because these decisions or actions are either so personal to the individual concerned or because other laws govern them and the Mental Capacity Act does not change this.

When does the MCA apply:

The MCA applies to situations where a person may be unable to make a particular decision at a particular time because their mind or brain is affected, for instance, by illness or disability, or the effects of drugs or alcohol. For example someone may be unable to make a decision when they are depressed but may be able to make the decision when they are feeling better. It may be the case that the person lacks capacity to make a particular decision at a particular time but this does not mean that a person lacks all capacity to make any decisions at all. For example a person with a learning disability may lack the capacity to make some major decisions, for instance where they should live, but this does not necessarily mean that they cannot decide what to eat, wear and do each day.

It is very important that you remember at all times that lack of capacity may not be a permanent condition.

How does the Mental Capacity Act affect Signposts work?

All staff, volunteers and students on placement will need to know about the Mental Capacity Act if they give advice and support to:

- people who may lack the mental capacity to make some decisions for themselves;
- people who care for, help or work with people who lack capacity; and/or
- anyone who wants to know more about the law and how it could affect them, for example if they want to prepare for a time when they might lack capacity.

Protection from liability for carers and professionals

When helping someone who lacks capacity, a carer or professional may have to do something for them which could legally be, for example, assault or theft. For example, if a person lacks the capacity to bath themselves and their carer does it for them, the carer is potentially committing assault in touching them without their consent, even though they weren't harmed in any way.

These rules apply to anyone who acts or makes decisions on behalf of someone who lacks capacity. As an adviser, relatives may ask you whether they are protected from liability for their actions, or you may want to be sure that your own actions and decisions on behalf of a client who lacks capacity are likely to be lawful.

The MCA offers carers and professionals protection from liability so long as they have a 'reasonable belief' that the person lacks capacity and their actions are in the person's best interests. This means that even if you can't show that you did a full capacity or best interest assessment in every instance, a belief that is based on good reasons (not just an assumption), within the spirit of the principles of the MCA, could protect you.

GUIDANCE

The principles are:

1. A person must be assumed to have capacity unless it is established otherwise.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him or her have been taken without success
3. A person is not to be treated as unable to make a decision merely because he or she makes an unwise decision.
4. An act done or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his or her best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Assume and enable capacity:

In applying the principles, staff must make every effort to enable people to make decisions for themselves, by being flexible, person-centred and responsive in:

- Providing all information relevant to the decision, including information about any choices or alternatives
- Taking an innovative and flexible approach to communicating in a way that the person is most likely to understand
- Providing information in a format that is likely to be understood by the person, not just relying on the written or spoken word

- Making the person feel at ease, and considering what is likely to be the most conducive time and location for them to make the decision
- Supporting the person and considering if others can help them understand information or make a choice.

Who can assess capacity?

Anyone can assess capacity, although a more formal assessment of capacity may be required for more significant decisions. A professional opinion may help to justify a finding about capacity, but the decision as to whether someone has or lacks capacity must be taken by the named 'decision-maker'.

Signposts would not expect their staff to assess capacity, but to understand the principles of the MCA and to ensure that where they believe there is a lack of capacity, that the MCA is implemented via line management structure or appropriate professional. Under these circumstances Signposts would not expect their staff to make any decisions on behalf of clients such as what to wear or eat, through to more serious decisions about where to live, having an operation or what to do with a person's finances and property.

Helping people who lack capacity to make decisions:

If your client or the person they care for lacks capacity to make a particular decision, then principles 4 and 5 of the Mental Capacity Act will apply (see above). Everyone making decisions or acting for someone who lacks capacity will be bound by these principles, whether they are a carer, relative, friend, lawyer, adviser, Attorney, representative of the Court or any other professional.

As an advice/support worker you will not only need to act in line with these principles but will need to be able to look at whether the principles have been followed by others involved in your case, for example, your client's GP or the Department for Work and Pensions.

Principle 4 - 'Best interests'

The principle of always acting in a person's best interests is a crucial part of the Mental Capacity Act, and should be central to any action taken on behalf of someone who lacks capacity.

The MCA gives a checklist of key factors that you must consider when working out what is in someone's best interests. It is not a full list and you should refer to the Code of Practice for more details. Checking 'best interests' includes the following.

Never make assumptions about the person lacking capacity based on their looks, age, appearance, behaviour, or their condition alone. How a person appeared last time you met them, or what your receptionist tells you about their behaviour, may be relevant to help you assess whether their condition may fluctuate but should not prejudice your assessment of their capacity in relation to the decisions you are considering.

Consider all the relevant circumstances, including looking at other options. For example, if a carer wants a relative with advanced dementia to move into a care home because they think they lack capacity to make decisions about everyday living, you should advise them that there may be other care and housing options available.

Consider postponing the decision if the person may regain the capacity to make it. For example, if a major decision needs to be made for someone who has had a recent stroke; it may be in their best interests to wait until they regain the capacity to make it for themselves.

Make sure that the person retains as much control and involvement in the decision-making as possible.

If the decision is about treatment needed to keep someone alive (called life-sustaining treatment), the person making the decision must not be motivated by a desire to bring about death.

Think about what the person lacking capacity would have decided for themselves by taking into account what is known of their past and present wishes, feelings, beliefs and values, (particularly if they have been written down). For example, a best interests assessment of a person who has always held outspoken views against accepting charity should take this into account when looking at maximising their income even though it may not in the end rule out an application for money from a charity if this is determined as being in their overall best interests.

As far as possible consult with others, such as family, friends and any Deputy or Attorney, and take into account what they think would be in the person's best interests.

Any other relevant factors must also be taken into account when assessing what is in someone's best interests. How issues are weighed up will depend on the individual case, and on things like the urgency and importance of the decision. There is further guidance on how to determine best interests in the Code of Practice.

Principle 5 – The less restrictive option

Principle 5 says that you or anyone else helping a person who lacks capacity should consider all possible options which will limit the person's rights and freedom as little as possible. This means that when you or anyone else does anything to or for a person who lacks capacity you must choose the option that is in their best interests (principle 4) and you must consider whether you could do this in a way that interferes less with their rights and freedoms of action.

When deciding on the best course of action to take for someone who lacks capacity to make a decision, conflict may arise. Principles 4 and 5 say that although the views of relatives or carers may be invaluable, decisions made should be based on what is best for the person and not about what anyone else wants.

Recording a decision where a person lacks mental capacity

The grounds for deciding that a person may lack capacity to make a particular decision must be recorded in the relevant electronic and/or paper records. The information recorded will become important in disputes, safeguarding procedures, and other legal or employment processes. It evidences how attempts have been made to maximise capacity, as well as the process and content of the assessment of capacity. Records will be maintained in accordance with Signposts data protection policy.

Naming a decision maker

The named decision maker is usually the person who intends to take some action in connection with the person's care, or who is contemplating making a decision on their behalf. The named decision maker will, however, depend on the particular circumstances. The name of the decision-maker must be recorded and this individual is responsible for ensuring that the Mental Capacity Act is followed.

Restraint

Restraint is defined within the Mental Capacity Act 2005 Code of Practice

(DCA 2008) as the use of force, or threatened use of force, to make a person do something that they are resisting, or any action that restricts a person's freedom of movement, whether they are resisting or not. Anyone considering using restraint must be able to demonstrate that it is necessary in order to protect the person who lacks capacity from harm, and any restraint used must be a proportionate response to the likelihood and seriousness of the harm. The minimum amount of the least intrusive type of restraint should be used, for no longer than is absolutely necessary, in order to achieve a specific outcome in the best interests of the person who lacks capacity. Although sections 5 and 6 of the Act provide for the use of restraint where it is necessary under the above conditions, section 6(5) confirms that there is no protection under the Act for actions that result in someone being 'deprived of their liberty', as defined by Article 5 of the European Convention on Human Rights, in the absence of a formal authorisation under the Deprivation of Liberty Safeguards.

Independent Mental Capacity Advocacy (IMCA) Service

The aim of the IMCA service is to provide independent safeguards for people who lack capacity to make certain important decisions and, at the time such decisions need to be made, have no one else (other than paid staff) to support or represent them or to be consulted about their best interests.

The contact details for North Lancashire area IMCA service are as follows:

Lancashire Consortium for Advocacy

3 Errigal House

Avroe Crescent

Blackpool Business Park

Blackpool

FY4 2DP

Tel 01253 362140

Fax 01253 407473

Email john@ncompass1.org

Any information or reports provided by an IMCA must be taken into account as part of the process of arriving at a decision as to whether a proposed decision is in the person's best interests. The decision-maker is responsible for ensuring that a referral to IMCA is made (i.e. this can be delegated to another member of the team). Under the Deprivation of Liberty Safeguards, the IMCA has additional roles – for more information refer to the Deprivation of Liberty Code of Practice (MoJ 2008).

Access to records and information

IMCAs have a statutory right of access to relevant information, which should be released at the point of referral. Where assessments are being undertaken in relation to an authorisation for Deprivation of Liberty, the statutory assessors have a right of access to records, information and people relevant to the assessments being undertaken. The release of relevant information will be in accordance with NHS North Lancashire's Information Governance Policy and Caldicott Guardian Principles. If in any doubt about the appropriateness of disclosing information, staff should be encouraged to discuss this with the Caldicott Guardian.

Relationship between the Mental Capacity Act, the Mental Health Act 1983 and the Children Act

Staff must note that the Mental Capacity Act does not apply to mental health treatment when the person is detained under the Mental Health Act. For more detailed guidance refer to the Code of Practice (DCA 2007). When the person concerned is aged 16 or 17, it

is possible to use the provisions of the Mental Capacity Act or the Children Act, depending upon which is most appropriate. For more detailed guidance refer to the Code of Practice (DCA 2007) and “The Legal Aspects of the Care and Treatment of Children and Young People with Mental Disorder: A Guide for Professionals” (National Institute for Mental Health in England 2009).

Deprivation of Liberty DOLS:

The Mental Capacity Act 2005 was fully implemented in October 2007.

The Mental Health Act 2007, which received Royal Assent in July 2007, included an amendment to the Mental Capacity Act to introduce additional Deprivation of Liberty Safeguards (DOLS), which come into effect on 1st April 2009. They protect vulnerable people in hospitals or care homes who lack the capacity to consent to the arrangements made for their care and/or treatment but who need to be deprived of their liberty in their own best interests to protect them from harm.

There will be a requirement, enshrined in law, that care will always be provided in a way that is consistent with the human rights of people who lack capacity to give informed consent to their care and treatment, and who are not otherwise protected or safeguarded through the use of the Mental Health Act or Court of Protection powers.

The new legal framework states that a person may not be deprived of their liberty in a care home or hospital unless a standard authorisation or an urgent authorisation is in force. The process for authorising deprivation of liberty requires an objective assessment of the person and the situation, and provides a process of review and appeal. The safeguards apply to people receiving care in local authority, NHS, independent and voluntary sector care homes and hospitals, irrespective of whether they are publicly or privately funded.

Primary care trusts (PCTs), local authorities, hospitals and care homes have a statutory responsibility for administering and delivering the MCA DOLS at a local level.

Other Signposts Policies

The Mental Capacity Act and Deprivation of Liberty Safeguards, sets clear expectations to empower and protect vulnerable people in the following areas of practice:

- Consent
- Equality & Diversity
- Safeguarding vulnerable adults
- Whistleblowing

Where policies or procedures are developed or reviewed for these areas of practice, they will be brought into line with the Mental Capacity Act and its Code of Practice.