



Libertatem Healthcare Group

Mental Capacity Act (MCA) and Deprivation of Liberties Safeguards (DoLS) Policy and Procedure

Notice to employees using a paper copy of this policy
The company Policies folder on the shared drive holds the most recent version of this document and all employees must ensure that they are using the most recent guidance.

Document Control

Document Name	Mental Capacity Act (MCA) and Deprivation of Liberties Safeguards (DOLS) Policy
Author	Karen Hodgkinson
Purpose	This policy underpins use of the Mental Capacity Act in Libertatem Healthcare Group. It sets out the main features of the Act, identifies the duties placed on staff and provides a procedure to determine the circumstances in which the various processes described in the Mental Capacity Act are initiated.
Compliant with CQC Regulation	9, 10, 11, 12 & 13
Approval Date	03.07.2019
Publication Date	03.07.2019
Review Date	June 2022
Distribution	All staff

Version Control

Version	Date	Amended by	Comments
1.0	January 2017	Jonathon Short	New policy implemented
2.0	10.11.2017	Karen Hodgkinson	Document checked and updated

Contents

Subject	Page
Introduction	4
Purpose	4
Scope	4
People covered by the Act	4
Assessment of Capacity	4
Best Interests	5
Acts in connection with care or treatment	5
Restraint	5
Advance decisions to refuse treatment	5
A Criminal Offence	5
Decisions which cannot be made by anyone else	6
Other Legislation	6
Roles and Responsibilities	6
Libertatem Healthcare Group staff	6
Decision makers	6
Designated decision-makers	6
A new Public Guardian	7
Independent Mental Capacity Advocate (IMCA)	7
Deprivation of Liberty Safeguards (DoLS)	7
Capacity	7
When Should Capacity be assessed	7
Assessing a person's capacity	8
Assessing Best Interests	8
Acts in connection with care or treatment	9
Disputes	9
Referral to an Independent Mental Capacity Advocate	9
Recording	9
Concerns	9
Training & Support	9
Monitoring & Review	10

Introduction

The Mental Capacity Act 2005 (MCA) provides a statutory framework to empower and protect vulnerable people who are not able to make their own decisions. It makes it clear who can take decisions on behalf of others, in which situations, and how they should go about this. It enables people to plan ahead for a time when they may lose capacity.

The Act is underpinned by a set of five key principles:

- A presumption of capacity - every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise;
- The right for individuals to be supported to make their own decisions - people must be given all appropriate help before anyone concludes that they cannot make their own decisions;
- That individuals must retain the right to make what might be seen as eccentric or unwise decisions;
- Best interests – anything done for or on behalf of people without capacity must be in their best interests;
- Least restrictive intervention – anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

Purpose

This policy underpins use of the Mental Capacity Act in Libertatem Healthcare Group. It sets out the main features of the Act, identifies the duties placed on staff and provides a procedure to determine the circumstances in which the various processes described in the Mental Capacity Act are initiated.

This Policy must be considered when any act in relation to care, carried out by Libertatem Healthcare Group staff, requires a user of our services, their client care staff or relatives, to make a decision or choice. It relates to other Libertatem Healthcare Group policies in that it should be considered when carrying out any act mandated by any other policy.

Scope

This policy applies to all Libertatem Healthcare Group employee's and client care staff, working with vulnerable people over 18 years of age who may not be able to make some of their own decisions.

People covered by the Act

The Act applies to people of 18 or over who lack capacity to make their own decisions. Most of the provisions of the Act apply to young people of 16 and 17 years old. Decisions relating to treatment of young people of 16 and 17 who lack capacity must be made in their best interests in accordance with the principles of the Act.

The young person's family and friends should be consulted where practicable and appropriate. However, a person needs to be 18 or over to make an advance decision, a Lasting Power of Attorney (LPA) or a will.

The Children Act 1989 covers the care and welfare of children in most situations. The Mental Capacity Act applies to children under 16 years in two ways:

- The Court of Protection can make decisions about the property and affairs of a child where it is likely that the child will lack capacity to make those decisions when they reach 16 years old.
- The criminal offence of ill treatment or neglect applies to children who lack capacity.

Assessment of Capacity

The Act sets out a single clear test for assessing whether a person lacks capacity to take a particular decision at a particular time. It is a "decision-specific" test. No one can be regarded as lacking capacity to make decisions in general. The Act makes it clear that a lack of capacity cannot be established merely by reference to a person's age, appearance, or any condition or aspect of a person's behaviour which might lead to unjustified assumptions about their capacity.

Best Interests

Everything that is done for or on behalf of a person who lacks capacity must be in that person's best interests. The Act provides a checklist of factors that decision-makers must work through in deciding what is in a person's best interests. A person can put his/her wishes and feelings into a written statement if they so wish, which must be considered by the decision maker. Also, carers and family members have a right to be consulted.

Acts in connection with care or treatment

Where care or treatment is provided for someone who lacks capacity, this can be provided without incurring legal liability by meeting the conditions of sections 5&6 of the MCA. The key is in the proper assessment and recording of capacity and best interests. This applies to actions that would otherwise result in a civil wrong or crime if interfering with a person's body or property in the ordinary course of caring. This will include actions such as giving an injection or by using the person's money to buy items for them.

Restraint

The Act defines restraint as any restriction of liberty of movement (whether or not the person resists) or the use or threat of force where an incapacitated person resists. Restraint is only permitted if the person using it reasonably believes it is necessary to prevent harm to the individual in question and the restraint used is proportionate to the likelihood and seriousness of the harm. This does not include a right to deprive a person of his or her liberty.

Advance decisions to refuse treatment

Statutory rules with clear safeguards confirm that people may make a decision in advance to refuse treatment if they should lose capacity in the future. An advance decision will have no application to any treatment where a doctor considers it necessary to sustain life unless strict formalities have been complied with:

An 'advance decision' is a decision made by an adult with capacity that if:

- At a later time a specified treatment is proposed to be carried out by a person providing healthcare,
- At that time they lack capacity to consent to that treatment, the specified treatment is not to be carried out or continued
- Is not binding if at material time person who made it still has capacity to give or refuse consent to the treatment being proposed
- Is not binding if not valid e.g. withdrew the AD at any time when had capacity, or has done something clearly inconsistent with the AD remaining his/her fixed decision
- Is not binding if not applicable to the treatment or if treatment is not the treatment specified in the AD, any circumstances specified in the AD are absent, or there are reasonable grounds for believing that circumstances exist which the person did not anticipate at the time of the AD and which would have affected his/her decision
- Is not binding if a LPA is created after the AD which gives the attorney the authority to give or refuse consent to the treatment to which the AD refers.
- An advance decision is not applicable to life-sustaining treatment unless it is verified by a statement to the effect that it is to apply to that treatment even if life is at risk and the decision is in writing, signed and witnessed. An AD not relating to life sustaining treatment can be given orally.

A Criminal Offence

The Act introduced a new criminal offence of ill treatment or neglect of a person who lacks capacity. There is no specified lower age limit. A person found guilty of such an offence may be liable to imprisonment for a term of up to five years.

There is no sanction for failing to comply with the Code of Practice but failure to do so may be used as evidence in civil or criminal proceedings.

Decisions which cannot be made by anyone else

The Act lists a number of decisions which may not be made on someone else's behalf where they lack capacity including:

- consenting to marriage or a civil partnership
- consenting to have sexual relations
- consenting to a decree of divorce on the basis of two years' separation
- consenting to the dissolution of a civil partnership
- consenting to a child being placed for adoption or the making of an adoption order
- discharging parental responsibility for a child in matters not relating to the child's property, or
- giving consent under the Human Fertilisation and Embryology Act 1990.

Other Legislation

The Act applies in conjunction with other legislation, under which health and social care staff have obligations, including:

- Health and Social Care Act 2008
- Data Protection Act 1998
- Disability Discrimination Act 1995
- Human Rights Act 1998
- Mental Health Act 1983
- National Health Service and Community Care Act 1990
- Human Tissue Act 2004.

Roles and Responsibilities

Libertatem Healthcare Group employee's and client care staff

All Libertatem Healthcare Group employee's and client care staff must:

- Adhere to the principles of the Mental Capacity Act 2005
- Follow the Code of Practice in assessing capacity and acting in the person's best interests.
- Seek advice on any matter where there is doubt about the lawfulness of intervening

Decision makers

The decision maker is determined by the nature and complexity of the decision to be made. Day to day care decisions may be made by Libertatem Healthcare Group staff. Complex social care, finance and accommodation decisions may be made by health and social care professionals. Doctors are the decision makers for medical decisions while nursing staff will usually be the decision maker in relation to routine care needs.

Designated decision-makers

The Act identifies two types of decision makers who have designated authority to make decisions.

Lasting Powers of Attorney (LPAs)

The Act allows a person to appoint two separate types of attorney to act on their behalf if they should lose capacity in the future. This now includes a finance attorney, to be known as a property and affairs LPA and a health and welfare LPA who will be able to make health and welfare decisions (including giving or refusing consent to treatment). A health and welfare LPA can only refuse life-sustaining treatment if provision has been made for this. LPAs came into effect in October 2007 and must be registered with the Court of Protection before they can be used. Anyone appointed as a health and welfare attorney will be the surrogate decision maker for a Service User or service user.

Court of Protection appointed deputies

The new Court of Protection has jurisdiction relating to the whole Act and is the final arbiter for capacity matters. It has its own procedures and nominated judges. The Act provides for a system of Court of Protection appointed deputies to replace the former system of receivership (existing receivers became deputies on implementation of the Act). Deputies will be able to take decisions on welfare, healthcare and financial matters

as authorised by the Court (but not be able to refuse consent to life-sustaining treatment). They will only be appointed if the Court cannot make a one-off decision to resolve the issues. The Court can also declare whether someone lacks capacity and adjudicate in contact issues. Anyone appointed as a Deputy will be the surrogate decision maker for a client.

If Libertatem Healthcare Group employee's/ client care staff are concerned about a decision that affects the welfare of a person who lacks capacity, the relevant local authority should make the application.

A new Public Guardian

The Public Guardian and his/her staff are the registering authority for LPAs and deputies. They will supervise deputies appointed by the Court and provide information to help the Court make decisions. They will also work together with other agencies, such as the police and social services, to respond to any concerns raised about the way in which an attorney or deputy is operating.

Independent Mental Capacity Advocate (IMCA)

An IMCA must be appointed to support a person who lacks capacity and has no family or friends to consult and where:

- It is proposed that the person needs serious medical treatment provided by the NHS (excluding treatment under Part 4 of the MHA 1983)
- It is proposed that the person is moved into long term care of more than 28 days in hospital (where this is not a requirement under the MHA 1983) c) It is proposed that the person is moved into long term care of more than 8 weeks in a care home
- It is proposed that the person is to be moved (for more than 8 weeks) to different accommodation, such as a hospital or a care home (where this is not a requirement under the MHA 1983)

An IMCA may also be appointed in cases of adult protection and care reviews.

The IMCA makes representations about the person's wishes, feelings, beliefs and values, looking at all factors that are relevant to the decision. If necessary, the IMCA can challenge the decision-maker on behalf of the person lacking capacity. The decision-maker is obliged to have regard to the IMCA's report. Contact details for IMCAs will be held by all the Trust's Mental Health Act Offices.

Deprivation of Liberty Safeguards (DoLS)

The MCA was amended through the Mental Health Act 2007 Amendment Act to incorporate the DoLS scheme. This provides a lawful process for hospital Service Users or residents of care homes to allow them to be deprived of their liberty where they lack capacity in relation to the arrangements made for their care or treatment but do not meet the threshold for the Mental Health Act. Any Informal Service User not meeting the requirements of the MHA who may be at risk of being deprived of their liberty should be formally reviewed by ward staff to determine whether a referral for a DoLS assessment is necessary or not. Failure to keep such client's under review may lead to unlawful detention.

Capacity

Presumption of capacity

The Act presumes that a person has capacity to make decisions. Libertatem Healthcare Group employees/ client care staff should make every effort to encourage and support the person to make the decision him or herself. This means seeing whether

- The person has all the relevant, available information
- The information could be explained or presented in another way that is easier to understand (e.g. photos, videos, sign language, pictures)
- There is a time of day or place which enhances the person's understanding
- Someone else can help or support the person to understand the information or make the choice.

When Should Capacity be assessed?

Assessing capacity correctly is vitally important to everyone affected by the Act. Someone who is assessed as lacking capacity may be denied their right to make a

specific decision – particularly if others think that the decision would not be in their best interests or could cause harm.

Also, if a person lacks capacity to make specific decisions, that person might make decisions they do not really understand. Again, this could cause harm or put the person at risk. So it is important to carry out an assessment when a person's capacity is in doubt. It is also important that the person who does an assessment can justify their conclusions.

There are a number of reasons why people may question a person's capacity to make a specific decision:

- The person's behaviour or circumstances cause doubt as to whether they have the capacity to make a decision
- Somebody else says they are concerned about the person's capacity, or
- The person has previously been diagnosed with an impairment or disturbance that affects the way their mind or brain works and it has already been shown they lack capacity to make other decisions in their life.

Assessing a person's capacity

Under the Act, capacity is decision specific. Health and social care staff can assess a person as lacking capacity to make a particular decision at a particular time by applying a functional, two part test.

The first part should determine whether there is an impairment of or disturbance in the functioning of the person's mind or brain.

If so, the second part of the test is to determine whether the impairment or disturbance makes the person unable to make the particular decision. The person will lack capacity to make the decision if, after all appropriate help and support has been given to them, he/she cannot fulfil any one of the four criteria below:

- Understand the information
- Retain the 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, sign language, or even blinking or squeezing a hand.

The person does have capacity if all 4 requirements are met. All clinical staff making decisions about capacity must be familiar with the capacity test.

Prior to assessing capacity, or at the point of admission those clients who staff are concerned may need assessment of their capacity, all attempts should be made to ascertain the existence of an LPA, deputy or an advance decision.

The following investigations should be undertaken:

- The client should be asked if any of these arrangements are in place and if so for further relevant information.
- The Care Plan within their clinical record should be consulted for relevant documentation.
- The relevant Case Manager should be contacted to make further investigation.
- All advance decisions and other arrangements for those who may lack capacity should be part of care planning and should be fully documented within the Client's Care Plan.

Assessing Best Interests

Any action taken or decision made for or on behalf of someone lacking capacity must be made in his or her best interests. The Act refers to a checklist of key factors for the decision maker to consider when determining what is in a person's best interests. This includes:

- Consideration of whether the person is likely to regain capacity and the decision can wait until then
- Consideration of all the relevant circumstances relating to the decision in question
- The person's past and present wishes and feelings
- An advance directive if valid and relevant

- Any beliefs and values (religious, cultural, moral) that might influence the decision
- The views of other people such as carers, close relatives or close friends or anyone else interested in the person's welfare, any attorney appointed under a Lasting Power of Attorney, any deputy appointed by the Court of Protection to make decisions for that person.

The decision maker must involve an Independent Mental Capacity Advocate (IMCA) for decisions about serious medical treatment or certain changes of accommodation where the person lacks capacity and there is no friend or family member for the decision maker to consult.

Acts in connection with care or treatment

When employee's/ client care staff carry out acts in connection with the care of individuals they believe lack capacity, they must satisfy the following conditions set out in Sections 5&6 of MCA:

- The act is one undertaken in connection with another person's care or treatment
- The person doing it takes reasonable steps to establish whether the recipient has capacity
- He/she reasonably believes that the recipient lacks capacity
- He/she reasonably believes that is in their best interests for act to be done
- If use restraint, he/she reasonably believes BOTH that it is necessary to do the act in order to prevent harm to the person and that the act is a proportionate response to the likelihood of their suffering harm and the seriousness of that harm

Disputes

If there is a dispute about capacity or best interests, the following action may be of assistance:

- Obtain a second opinion
- Hold an informal or formal multi-agency 'Best Interests' case conference
- Go to mediation
- Apply to the Court of Protection for a ruling
- Involve an independent advocate

Referral to an Independent Mental Capacity Advocate

Decision makers must refer clients who lack capacity to an Independent Mental Capacity Advocate if they have no relative or friend to speak on their behalf and the decision relates to serious medical treatment or a move.

A referral may be made when there is a care review about accommodation or changes to accommodation, or there is an adult protection investigation and there is a conflict with professionals or carers about the protection plan

Recording

Clinical Records may be used if there is a dispute or legal proceedings. Libertatem Healthcare Group employee's/ client care staff must keep accurate records of decisions taken about capacity and best interests. This includes demonstrating that a capacity test was carried out and decisions were based on all the available evidence and reasonably took into account all available views.

Concerns

All employees must always report suspicions of abuse of a person who lacks capacity to the relevant agency. Concerns raised by clients, client care staff or others in the community will be taken seriously. Where applicable, reference should be made to Libertatem Healthcare Group Safeguarding Policy. In other cases, Libertatem Healthcare Group will fully support any member of client care staff who raises a legitimate concern about the treatment of any of its clients and will take appropriate action in response.

Training & Support

Those requiring knowledge of the Deprivation of Liberty Safeguards scheme will be offered training. Other training may be provided locally to ensure client care staff are fully supported in delivering care or treatment to clients who may lack capacity.

Additionally, periodic presentations will be offered to client care staff to ensure that they are familiar with relevant aspects of MCA.

Monitoring & Review

Use of the MCA will be monitored by the Clinical Director and any prevailing issues will be reviewed by Libertatem Healthcare Group's Board of Directors.