

Mental Capacity Act 2005



Independent Mental Capacity Advocacy (IMCA) and The Deprivation of Liberty Safeguards (Dols)

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Mental Capacity Act 2005

- Provides a statutory framework to empower and protect vulnerable people who may not be able to make their own decisions.
- The MCA enshrines in statute current best practice and common law principles concerning people who lack capacity and those who take decisions on their behalf.



What is mental capacity?

- Mental capacity is the ability to make a decision
- Capacity can vary over time
- Capacity can vary depending on the decision to be made
- Physical conditions, such as location, can affect a person's capacity
- Staff must not assume a lack of capacity because of a person's age, physical appearance, condition or an aspect of their behaviour



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Who Is Affected?

- Mental capacity can affect anybody. Over 2 million people in England and Wales lack mental capacity to make some decisions for themselves: learning disabilities, dementia, mental health difficulties, brain injury.
- Can be a permanent incapacity or temporary incapacity due to illness (infection, for example).
- The Act also affects up to 6 million family carers, carers, health and social care staff.



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The 5 Key Principles

- A presumption of capacity
- The right for individuals to be supported to make their own decisions
- Individuals must retain the right to make what may seem to be eccentric or unwise decisions
- Anything done for or on behalf of someone must be done in his/her **best interests**
- Least restrictive intervention



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Who decides capacity?

- The person who wishes to take some action in connection with the person's care or treatment or who is contemplating making a decision on the person's behalf
- Will depend on the circumstances and the decision to be made:
 - Consent to medical treatment –
Consultant/doctor proposing the treatment
 - Change in accommodation –
Care Manager/Social Worker/ASO



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Assessing Capacity

Clear test to assess whether a person lacks capacity to **take a particular decision at a particular time.**

Stage 1

Inability to make a decision must be due to an impairment of or disturbance in the functioning of mind or brain.



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Stage 2

If there is an impairment, that impairment has made the person unable to make a particular decision.

A person is unable to make a decision if they cannot:

- understand information relevant to the decision
- retain the information in their mind
- use or weigh the information as part of the decision-making process, or
- communicate their decision (any form of communication is sufficient)



Exercise

Find a partner, not the person sitting next to you. Spend 5 minutes discussing what 2 things that are important to you in your life, that you would want to continue if you ever lost capacity. This is other than family, friends, etc.

For example: you may need to listen to music in order to fall asleep, want your hair to be dyed, or have a weekly manicure.



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Best Interests Checklist

- Avoid discrimination (cannot be based on age, appearance, condition, behaviour, etc)
- Encourage participation
- Identify all relevant circumstances, i.e. the things the person would take into account if they were making the decision
- Find out the person's views
 - Past and present wishes and feelings
 - Beliefs and values
 - Any other factors the person may consider
- Consult others
- Is it likely the person will regain capacity? If so, can the decision be put off until then?
- Avoid restricting the person's rights. The least restrictive option must always be taken



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What to consider

- **Medical** – not just the outcome, but what will be the burden and benefit of the treatment.
- **Welfare** – How will this impact (for better or worse) on the way the person lives their life?
- **Social** – What will this do to the person's relationships etc?
- **Emotional** – How will this person feel, react?
- **Ethics** – Is the decision ethical?



Decisions that cannot be made on someone's behalf

These include:

- Consent to sexual relations
- Consent to divorce or dissolution of a civil partnership
- Consent to a child being placed for adoption or making an adoption order
- Voting

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New Criminal Offences

The Act introduced (in April 2007) 2 separate offences:

- Ill treatment
- Wilfull neglect

Liability is personal, not vicarious.

Penalties range from a fine, to imprisonment of up to 5 years, or both.



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Protection from liability

- It is important to keep a full record of what has happened. The protection from liability will only be available if you can demonstrate that
 - you have assessed capacity,
 - reasonably believe it to be lacking and then
 - acted in what you reasonably believe to be in the person's best interests.
- The Act will offer 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 Act, could protect you.



Recording decisions about capacity

- Assessment may be challenged, and must stand up to independent scrutiny. Access to records or formal reports may be required by the Court of Protection or Office of Public Guardian
- Good practice is to record proper assessment of capacity and the findings in relevant records
- May be a separate form placed in appropriate records or recorded in the records directly



Recording decisions about capacity

- Record should show:
 - What the decision was
 - Why the decision was made
 - How the decision was made:
 - who was involved and
 - what information was used
- Information gathered should be documented carefully and specifically



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Planning Ahead for a Time When You Think You Might Lack Capacity

The Act provides new and clearer defined ways of planning ahead:

- Lasting Powers of Attorney
- Court Appointed Deputies
- Advance Decisions to Refuse Treatment



Lasting Power of Attorney

- Two different LPAs to cover a range of circumstances:
 - personal welfare (including healthcare)
 - property and affairs (finance)
- • **Who can be an attorney?**
 - family
 - friend
 - professional, e.g. lawyer
- An attorney must be over 18 years old
- An individual can be an attorney for more than one person
- Staff should **not** normally act as attorneys



Lasting Power of Attorney

- If a person welfare LPA is in place, but does not include the authority to make the decision which now needs to be made, health and/or social care staff need to make a best interest decision – but must consult with the Attorney
- A personal welfare LPA will only take effect once the person has lost capacity to make that particular decision



Lasting Power of Attorney

- An LPA concerning financial matters will take effect once registered, unless donor specifies that it should not take effect until they lose capacity
- Must make sure the LPA is registered – can check with the Office of Public Guardian



Court Appointed Deputies

- A person appointed to make certain decisions on behalf of a person who lacks capacity to make those decisions
- Could be a family member, carer or any other person the Court thinks suitable including a trust
- Can be appointed to deal with financial matters and/or personal welfare – although latter is rare
- Check with Office of Public Guardian if unsure whether the person has been appointed



Advance Decisions

- An **advance decision** is prepared when a person has capacity
- It is a decision to refuse specific treatment and is binding
- Other expressions of an individual's preferences are not binding but must be considered
- Staff must be able to recognise when an advance decision is valid
- An advance decision must be written, signed and witnessed if life-sustaining treatment is being refused
- A relevant Lasting Power of Attorney will override an advance decision if it is made after the decision
- An advance decision can be withdrawn: – by the individual while they have capacity, or – if the individual does something that is clearly inconsistent with the advance decision, or – by the decision maker if treatment is now available that was not available when the advance decision was made



INDEPENDENT MENTAL CAPACITY ADVOCACY (IMCA)

- Statutory service
- Represents the person without capacity
- Criteria set down in the MCA Code of Practice.
- Can challenge the decision-maker on behalf of the person lacking capacity, if necessary



INDEPENDENT MENTAL CAPACITY ADVOCACY (IMCA)

Criteria

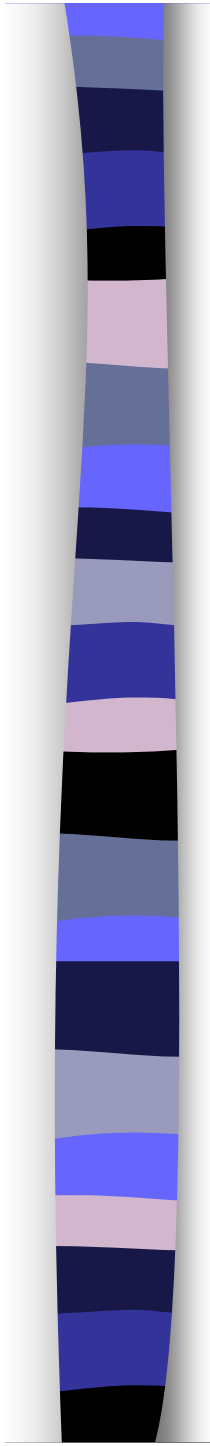
- Must be involved in decisions regarding
 - **Serious medical treatment** (e.g. chemotherapy, radiotherapy, amputation of a limb, etc); and/or
 - **Changes of accommodation**, where the move is going to be for 8 weeks or longer.
- Discretionary involvement in:
 - **Safeguarding Adult** cases (whether they are being protected or investigated)
 - **Care reviews**



INDEPENDENT MENTAL CAPACITY ADVOCACY (IMCA)

Criteria (continued)

- Person has been assessed as lacking the capacity to make that particular decision.
- Person has no next of kin, family or friends, or unpaid carer who is willing or able to represent them or be consulted in the process of working out their best interests.



INDEPENDENT MENTAL CAPACITY ADVOCACY (IMCA)

The IMCA's role is to:

- Seek to establish meaningful communication
- Have a private discussion with the person to establish wishes and feelings about decision (where possible)
- Make observations regarding interaction and environment
- Question capacity to make decisions (IMCA may feel person has capacity, can request re-assessment)



INDEPENDENT MENTAL CAPACITY ADVOCACY (IMCA)

- Obtain the view of professionals and paid workers providing treatment for the person, and the views of anyone else who can give information about the wishes and feelings, beliefs or values of the person who lacks capacity
- Access appropriate medical or health records
- Ascertain possible alternative courses of action
- Obtain further medical opinion (where necessary)
- Review Best Interest checklist



INDEPENDENT MENTAL CAPACITY ADVOCACY (IMCA)

The IMCA Pre-Decision Report:

- Advises of findings and “Options to Consider” – the IMCA does not make recommendations or make a decision.

Responding to the Pre-Decision Report

- The Decision Maker should let the IMCA know what has been decided within 5 working days of the decision being made or *before any action is taken in regard to the decision, which ever is the sooner.*

IMCA Quiz



INDEPENDENT MENTAL CAPACITY ADVOCACY (IMCA)

Referrals made an IMCA Referral Form to:

WIRED

(Wirral Information Resource for Equality and Diversity Ltd)

Unit 7 Wirral Business Park

Arrowe Brook Road, Upton,

Wirral, CH49 1SX

Tel: 0844 880 1500

Fax: 0151 670 1600

Email: contact@wired.me.uk





INDEPENDENT MENTAL CAPACITY ADVOCACY (IMCA)

- Assessment Toolkit, which includes:
 - Assessment of Capacity Form
 - Best Interests Checklist Referral Form
 - Referral Form
 - Contact List of Generic Advocates
 - Pathway
 - Contact WIRED



Deprivation of Liberty Safeguards

- Bournemouth Judgement
- Definition of DOLS
- The roles of the Independent Mental Capacity Advocate (IMCA)



Deprivation of Liberty Safeguards

- The Deprivation of Liberty Safeguards were introduced to prevent breaches of the European Convention on Human Rights. One case that specifically triggered these safeguards is the case commonly known as *Bournewood*.



Deprivation of Liberty Safeguards

Bournewood:

- Autistic man with a learning disability
- Lacked capacity to decide whether he should be admitted to hospital for specific treatment.
- Admitted on an informal basis under common law in his best interests, but this decision was challenged by his carers.
- House of Lords held there had been a breach of the European Convention of Human Rights Article 5. To prevent similar breaches the Deprivation of Liberty Safeguards were introduced.



Deprivation of Liberty Safeguards

What do they do?

- Provide legal protection for those vulnerable people who are, or may become, deprived of their liberty who:
 - Have a mental disorder.
 - Lack capacity to consent to arrangements made for their care or treatment.
 - Need that care or treatment to protect them from harm, and it appears to be in the person's best interests; and are
 - Are in a hospital or care home, whether placed there under public or private arrangements.



Deprivation of Liberty Safeguards

- Do not apply to people detained under the Mental Health Act 1983
- Provide a proper legal process and suitable protection in circumstances where a deprivation of liberty appears to be unavoidable, in a person's own best interests



Deprivation of Liberty Safeguards

Case example

- Marilyn, 34 - fourth pregnancy – mental disturbance – serious health issues with previous pregnancies: DVT and haemorrhaging – sexual abuse – non-engagement with medics – Court of Protection – restraint, chemical and physical – treated - Caesarean Section - continued health care – contraception – Section under the Mental Health Act



Deprivation of Liberty Safeguards


When can someone be deprived of their liberty?

- In their own best interests to protect them from harm.
- Must be proportionate to the likelihood and seriousness of the harm, and
- There is no less restrictive alternative.
- Under no circumstances must the deprivation of liberty be used as a form of punishment, or for the convenience of professionals, carers or anyone else. It should not be extended due to delays in moving people between care or treatment settings, for example, when somebody is waiting discharge from hospital.



Deprivation of Liberty Safeguards

- The difference between a deprivation of liberty and restriction is one of degree and intensity.

Restriction  Deprivation

- It is important to remember that no 2 cases are alike and each individual case must be assessed on its own circumstances.
- See separate handout.



Deprivation of Liberty Safeguards

Role of the IMCA

The role of the IMCA is to

- represent the person during the assessment for the DOLS Authorisation;
- assist the person and their appointed representative to understand the effect of the Authorisation;
- (in certain circumstances) act as the person's representative until another representative can be appointed



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Further information and downloadable guidance and forms:

Mental Capacity Act and Deprivation of Liberty Safeguards: www.scie.org.uk

Lasting Power of Attorneys and Court Appointed Deputies: www.direct.gov.uk