Brainkind

MCA & DoLs

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Ver 1.0	25/05/2	Major update	New Policy drafted

Contents

1 Introduction

The Mental Capacity Act (MCA) 2005 applies to everyone involved in the care, treatment and support of people aged 16 and over living in England and Wales who are unable to make all or some decisions for themselves.

The MCA is designed to protect and restore power to those people who lack capacity. All professionals have a duty to comply with the MCA Code of Practice

The MCA also supports everyone in the population over the age of 18 who have capacity and choose to plan for their future life, it is designed to empower those in health and social care to assess capacity themselves, rather than rely on expert testing

This policy is based on the Mental Capacity Act Code of Practice. Part of the Mental Capacity Act 2005 includes the Deprivation of Liberty Safeguards (DoLS) and will be included in this policy.

Scottish law follows a different set of legislation and therefore a separate policy will cover these services

2 Purpose

This policy and associated procedures, alongside the implementation of the related Codes of Practice, aim to ensure that staff are aware of the requirements of the MCA and are able to comply with their legal duties.

3 Responsibilities

Role	Responsibilities
Clinical Director	Maintain governance and oversight of the implementation of this policy & procedures Feedback exceptions to the CEO

Head of Nursing	To advise Brainkind on any changes or updates relating to the Mental Capacity Act and related regulations To disseminate information as appropriate Deprivation of Liberty Provide exceptions reports to the Quality Performance and Risk group
Regional Managers	To monitor compliance with the Policy
Safeguarding Leads	To provide advice and support with the management of capacity assessments and DOLS applications – to feedback information shared in safeguarding lead meetings relating to MCA and DOLS to the teams in their services
Service / Area Managers	To maintain or to delegate maintenance of the DoLS register completion and follow up authorisation requests
Clinical Lead	To ensure all capacity assessments are completed as required and that DOLS authorisations are applied for in a timely manner
All staff	To understand the roles and responsibilities in relation to capacity and DOLS management

4 Procedure

4.1 What is Capacity?

Mental capacity is the ability to make a decision, including the ability to make a decision that affects daily life as well as more significant decisions and decisions that may have legal consequences.

For every decision about provision of healthcare or treatment staff must know that they are either acting with the person's informed consent or in their best interests (as defined in the MCA); therefore, an assessment of capacity is an integral part of the process.

4.2 Five principles of the MCA

The Act's five statutory principles are the benchmark and must underpin all acts carried out and decisions taken in relation to the Act. Principles 1 -3 support the process before or at the point when determining if the person lacks capacity

1. A presumption of capacity
2. Individuals must be supported to make their own decisions
3. People have the right to make, what some may deem an unwise
4. People must always act in the best interests of people without capacity;
5. Decisions made should be the least restrictive option

4.3 When to Assess Capacity

The trigger for assessment of capacity is that a decision has to be made. The starting point must always be to assume that a person has the capacity to make a specific decision. If there are doubts about the person's capacity, then a capacity assessment must be carried out.

Assessment of capacity can be informal through daily conversation, but on occasions where there is concern about an individual's ability to understand health/treatment information, the assessment must be formalised and documented.

Doubts about capacity may arise because the person has a diagnosis of impairment in mind or brain function.

An assessment that a person lacks capacity to make a decision must never be based simply on:

- Age
- Appearance
- Assumptions about their condition
- Any aspect of their behaviour

It is accepted in law that emergency care takes precedence over capacity assessment. Any treatment provided must always be in the patient's best interests in accordance with the MCA 2005.

4.4 Who Can Assess Capacity?

Anyone can assess capacity. The best person to assess capacity is dependent on the decision to be made. The Act requires a person to be named as the decisionmaker, and this person is responsible for ensuring the Act's requirements are followed and documented.

4.5 The Decision Maker

The person with overall responsibility for assessing capacity is the Decision Maker as identified in the MCA Code of Practice, and is defined as:

''The person who is most appropriate to make a particular decision or has the specific authority to make the decision is usually the clinician taking responsibility for care and treatment at the time the treatment decision is required''.

For decisions relating to nursing care or therapy provisions then the person who is providing the care of therapy must be assessing capacity to consent to care.

With regards to discharge planning decisions, the External Social Care team are usually best placed to do their own capacity assessment in conjunction with the current placement team.

For decisions relating to external medical treatment, the decision maker would be the clinician providing the treatment.

The name of the decision maker must be recorded.

When proven an individual lacks the mental capacity to make the decision, then the process of arriving at a decision of 'best interest' should commence and be led by the decision maker.

Responsibilities of the Decision maker are:

- to consider and make all reasonable adjustments to allow the person to make their own decisions. (e.g. using an interpreter, Communication tool or using picture as appropriate).

- to ensure that the questions asked, decisions made, and adjustments used are recorded in the service user record

4.6 Enabling People to Make Decisions

Staff must approach decision making support in a person centred, flexible and responsive way to each individual's communication needs. This can be achieved by:

- Providing all information relevant to the decision
- 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,
- 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.
- When possible, delay the decision, until the person can make the decision themselves.
- Supporting the person and considering if others can help them to understand information, the risks and the benefits and therefore make an informed choice.

4.7 Formal Assessment of Capacity

Staff must carry out a formal two stage assessment using Brainkind template Appendix 1 – Record of a Mental Capacity Assessment Form 1;

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/ETFVDfRWz9lKknr0YAY6F_p8BtZKRTCZsZKGpdmlU6rE94g?e=x1wO3w

An assessment of a person's capacity must be based on their ability to make a specific decision at the time it needs to be made, and not their ability to make decisions in general.

A person is considered unable to make a decision if they are unable to do one or more of the following things:

- Understand the information given to them that is relevant to the decision.
- Retain that information long enough to be able to make the decision.
- Use or weigh up the information as part of the decision-making process.

- Communicate their decision – this could be by talking or using sign non-verbal communication methods and can include simple muscle movements such as blinking an eye or squeezing a hand.

The depth of the capacity assessment will depend on the nature and impact of the decision being made.

For significant decisions a more detailed assessment of capacity will be required. The opinion of others may assist in a finding of capacity but the decision as to whether someone has or lacks capacity must be taken by the identified decision maker.

The minimum requirements for documenting an assessment of capacity are that the information relating to the stages of capacity are recorded within the service users record.

The record should evidence that the staff member has identified the impairment or disturbance in the functioning of the mind or brain and assessed the ability to understand, retain and weigh up the relevant information to the specific decision and if they have been able to communicate their decision by any means.

4.8 Appointing an Independent Mental Capacity Advocate (IMCA).

In cases where the person lacks capacity and requires support to make a significant decision, an IMCA should be appointed.

IMCAs are mainly instructed to represent people where there is no one independent of services, such as a family member or friend, who is able to represent the person.

The IMCA will be responsible for bringing to the attention of the service, any relevant information, feelings, beliefs and values of the patient who lacks capacity.

The IMCA will be permitted to challenge any decision previously made in the best interests of the patient.

4.9 Best Interest Meeting and Checklists

When a person is assessed as lacking capacity to consent or refuse care and/or treatment a best interest decision must be made by the decision maker (or an application to the Court of Protection for a court order/declaration).

As with assessments of capacity, each best interest decision must be decision specific and evidenced through care/support planning documentation.

Please see Appendix 3 - The Best Interest Decision making template;

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/EVBD48q5WERHvlrF-_Hy_DQgBc5o5fwPtWdbIQ-ZEm-3PIQ?e=JUeqNw

Mental Capacity Act identifies a clear best interest checklist that should be considered during the process of identifying a person's best interest.

- Will the person regain capacity in order to make the decision?
- If so, can the decision wait until a time the person has regained capacity?
- Has the person been supported and encouraged to participate in the decision-making process?
- What are the person's known wishes, feelings, beliefs and values that may impact on the decision being considered?
- Are there any other factors the person would consider if they had capacity to make the decision?
- What are the views of those interested in the welfare of the person?
- Has the person identified anybody to be included in the process?
- Is there a registered LPA or Deputy of the Court who has authority to make the decision being considered?

A ''Best Interests" meeting may be needed when a lack of capacity has been established and a serious decision or medical treatment is proposed.

The principle of best interests will not apply:

- When someone has previously made an advance decision to refuse medical treatment whilst they had capacity to do so

4.10 Deprivation of Liberty Safeguards (DoLs)

4.10.1 When someone can be deprived of their Liberty

Depriving someone, who lacks the capacity to consent to the arrangements made for their care and treatment, of their liberty is a serious matter, and the decision to do so must not be taken lightly.

The Deprivation of Liberty Safeguards makes it clear that a person may only be deprived of their liberty:

- In their own best interests to protect them from harm;
- If it is a proportionate response to the likelihood and seriousness of harm

- If there is no less restrictive alternative.

4.10.2 How to identify deprivation of liberty

In determining whether deprivation of liberty has occurred, or is likely to occur, decision-makers need to consider the facts in each individual case. There is unlikely to be any simple definition that can be applied in every case, and it is probable that no single factor will, in itself determine whether the overall set of steps taken in relation to the relevant person amount to deprivation of liberty

The definition of a deprivation of liberty is determined by UK and European Courts and is known as the 'acid test'.

Currently a person is considered deprived of their liberty if:

- The person is confined to a hospital or care home for any period of time, and
- They are subject to continuous supervision and control, and
- They are not free to leave, and
- They lack capacity to consent to their arrangements

This means that if a person is subject both to continuous supervision and control and not free to leave, they are deprived of their liberty.

4.10.3 Process to follow when some-one is identified as being deprived of their liberty

It is the responsibility of the Clinical lead (when in a clinical team is in a service) or the Service manager when no clinical team to apply for DOLS

Applying for a Deprivation of Liberty Safeguard (DoLs)

Brainkind uses a standard set of forms published by the Department of Health for applying for authorisation. Please see links to forms in section 6.

The person completing the form should:

- Ensure all fields within the form are completed.
- Forms must be completed electronically and emailed via a secure email to the appropriate DOLS team.
- The Service Manager and the safeguarding lead for the service must be included in the email.
- Inform patient's NOK / relevant others of decision to apply for authorisation and advise that they will be required to be involved in the process

If an application for DoLS authorisation is not appropriate at the time of initial assessment, the assessment of restrictive practice will need to be repeated at

agreed and documented intervals to ensure that the DoLS status has not increased, thus requiring an authorisation.

Staff will be notified by the Local Authority of all successful authorisations with dates of expiry recorded by the person responsible for the DOLS management

4.10.4 Recording of DOLS authorisations

When a DOLS authorisation is applied for the DoLS register in Datix should be completed. The process for uploading information can be found within the DoLS Training guidance

Copies of notification must be retained in the individual record and uploaded to Datix

The DoLS record must remain open until the patient ceases to be deprived of their liberty under MCA or until the patient is discharged to another location.

A DoLS authorisation is time limited and therefore renewal authorisations should be applied for one month before the expiry date.

Failure to adhere the above criteria may lead to a situation where a patient is being unlawfully detained or restricted.

4.10.5 Brainkind as a Managing authority

Under the terms of the DoLS Code of Practice, all care providers are classed as a Managing Authority

When a patient lacks capacity and is receiving care where levels of restriction and restraint are so high that they constitute a deprivation of liberty, the service must apply for a Standard Authorisation to the Supervisory Body

Where deprivation of liberty needs to commence before a Standard Authorisation can be obtained, Brainkind is able to grant themselves Urgent Authorisation whilst applying for a Standard Authorisation

4.10.6 Extra care and Supported living settings

DoLS is not applicable in extra care and supported living although someone may still be deprived of their liberty, the application for authorisation will be through the Court of Protection.

A person in supported living can be deprived of their liberty and the Acid test must still be followed. The relevant local authority must be contacted in each case where it is thought that a deprivation may occurring so this can be taken to the Court of Protection.

The Court sets out guidelines in settings outside the scope of the DoLS, which included a requirement that the public authority seek authorisation from the Court of Protection under Section 16 Mental Capacity Act (MCA), and the Court must review the authorisation at least annually.

4.11 Safeguarding

There are close links between Safeguarding Adults and the Deprivation of Liberty Safeguards

If abuse is suspected or witnessed Brainkind's Safeguarding Policy and Procedure must be followed. See Safeguarding Policy;

https://thedisabilitiestrust.sharepoint.com/:b:/s/thehub/documents/ERBs8-NhwL1HuhxOM_MYlmkBtXCg3IO6QFKflaUS1QfdrA?e=xRkid6

The Best Interests Assessor or any other person can act as an "Alerter" at any point they witness or suspect abuse "Alerting occurs when a member of staff is informed, or has concerns, that abuse or neglect has occurred, or is suspected." Alerts can be made directly to the Local

Authority Safeguarding Referral point if information cannot be shared with the home manager, the person responsible for referring, or another manager within the organisation, as you believe that the home manager is implicated or colluding with the alleged abuse

Advance Decisions to Refuse Treatment – ADRT – including life- sustaining treatment, and 'Consent to Treatment'.

An advance decision enables someone aged 18 and over, while still capable, to refuse specified treatment for a time in the future when they may lack the capacity to consent to or refuse that treatment. This used to be known as a "Living Will"

People can only make an advance decision under the MCA if they are 18 or over and have the capacity to make the decision. They must say what treatment they want to refuse, and they can cancel their decision – or part of it – at any time. It cannot be used to:

- Demand specific forms of treatment, as there is no right in law to do so
- Require a doctor to do anything unlawful e.g. assist suicide
- Replace a last will and testament.
- Dispose of a property
- Appoint executors to a will.
- Refer to an event after the person's death e.g. post-mortem

An advance decision to refuse treatment, which has been properly made and is not subject to legal exception (e.g. detention under the Mental Health Act) is a legal document with which Brainkind and its employees and agents must comply.

An advance decision to refuse treatment must be valid and applicable to current circumstances; staff must have sight of the documents and make a copy for the records. If a valid advance decision is in place, it has the same effect as a decision that is made by a person with capacity: Brainkind and its employees must follow the decision.

4.12 Lasting Power of Attorney (LPA)

The Act introduced two new forms of Power of Attorney in October 2007, known as LPAs.

These are a

- LPA for health and welfare
- LPA for property and finance.

Where the existence of an LPA is declared, usually but not always by family members, the Service Manger or Clinical Lead must see the original document to ensure that it is registered with the Office of the Public guardian (OPG) and to determine what powers it actually gives, and to whom.

A photocopy of relevant pages e.g. treatments refused, names and contacts of donees or deputies etc. for the LPA must be obtained and placed in the clinical record.

4.13 Court Appointed Deputies

In some circumstances when a person lacks capacity to appoint a Lasting Power of Attorney, and on-going decisions are required, the Court of Protection may appoint a deputy to make specific decisions. Court appointed deputies make decisions that are as valid as those made by a person with capacity.

The Court of Protection will stipulate what decisions can be made by the deputy.

In the majority of cases, the court appointed deputy is likely to be a family member or a person who knows the individual well, but in some cases the court can decide to appoint a deputy who is independent from the family.

As with LPA's, staff must check the powers of any court appointed deputy and when powers have been given associated to welfare decisions a copy of the court direction must be retained within the clinical record.

4.14 Financial decisions

The capacity to make financial decisions should be implemented in line with the Mental Capacity and Best Interests Decision Making

If possible, prior to admission, each service should acquire information in regard to how each service user manages their finances, and if there is a financial Legal Power of Attorney (LPA) or Deputy or an Appointee in place for Department of Work and Pensions (DWP) benefits.

After admission, professionals should ensure that a discussion is held with each service user in regard to his / her finances.

This initial discussion will determine whether a capacity assessment is required. If at any time there are doubts regarding the capacity of the service user to manage his / her finances or make specific financial decisions, then a capacity assessment should be undertaken.

The capacity assessment for finances can incorporate three different stages:

1. The first stage would assess coin recognition, basic arithmetic skills and include observation in the community in regard to money handling.

2. The second stage would involve how much money the person is receiving from benefits, savings, etc., and determine whether or not the person can manage his / her bank account and larger amounts of money.

3. The third stage, if relevant, may involve an assessment as to the capacity to manage all bank accounts and property in the service user's name and may also determine whether the person can understand what money is being received from benefits and the management (with support) of these benefits.

If the capacity to manage property and savings is in doubt, then an application for a Deputy should be made to the Court of Protection. In practice, this is usually completed by a family member, but can also be completed by a solicitor if an appropriate family member cannot be identified.

4.15 Decisions excluded from the Act

The following decisions are excluded from the Act:

- Consenting to marriage or a civil partnership
- Consenting to have sexual relations
- Consenting to a decree of divorce
- Consenting to the dissolution of a civil partnership
  Consenting to a child being placed for adoption or the making or and adoption order
- Discharging parental responsibility for a child
- Giving consent under Human Fertilisation and Embryology Act

5. Training

E-Learning for Mental Capacity Act and DoLs every 3 years for all staff employed in services.

MCA and DOLS briefing packs are available for Managers to support staff with any learning gaps

6. Appendices

Appendix 1 – Record of a Mental Capacity Assessment Form 1

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/ETFVDfRWz9lKknr0YAY6_Fp8BtZKRTCZsZKGpdmlU6rE94g?e=kvSbXD

Appendix 2 – Mental Capacity Act Review Form 2

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/Eba7hM9WkStJiOg3KPW_eTo0Bt2-5NFZNUHRNj-YPbN5XWA?e=HEoYfs

Appendix 3 – Record of Best Interest Decision Form 1

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/EVBD48q5WERHvlrF-_Hy_DQgBc5o5fwPtWdbIQ-ZEm-3PIQ?e=OMhdsv

Appendix 4 – Review of Best Interest Decision Form 2

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/EVThY-7pBpRInfvFtOMMQaoBwKC5MmJ-ozReKL1vVpZtfA?e=r7gi44

DoLs Forms – Section 4.10

Form 1 - DoLs Standard and Urgent Request Form;

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/Ed9YeXvEi8JFlvlbr8yMW_asB8sdJyzfU3JRbboNc3IFX4g?e=fvK0tH

Form 2 – DoLs Further Authorisation Request

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/EbQgItcQi8lOtiNDG6pf2p QBSHioPSGHBA4jdzM4FjEpsQ?e=USB2Bn

Form 3a – DoLs Bia No Deprivation

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/EY172u-KSkhLkqhxw_YqYOABNpY5tYTWhv63D5E9UCuosA?e=lhW78Z

Form 3b – DoLs Renewal with Capacity Assessment

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/EfybHpFSC8dNotBp817G F8IB5QdeC-vwHIhdpBp0xvbz3Q?e=eVoh7I

Form 3 – DoLs Bia Combined Assessments

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/EQxs0NlZrCtPpsXD769o MsIByFAz-NoGYruWXcBuU65THA?e=GfLn2o

Form 4 – DoLs Mental Health Eligibility Capacity Assessments

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/EQxs0NlZrCtPpsXD769o MsIByFAz-NoGYruWXcBuU65THA?e=GfLn2o

Form 5 – DoLs Standard Authorisation Granted.

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/ETuawDzvyCBBk7- kIORZcTIBODXr0A0qwWLuBVuuUjZTjw?e=rUPXtk

Form 6 – DoLs Standard Authorisation Not Granted

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/EQZnYY4G2EpAqALKAZ cX-YcBmWlkvQpUjLylqHgV3GsiXw?e=SQjY8x

Form 7 – DoLs Suspension of Standard Authorisation

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/ETrw0QxQl5BGjBsX0r3a R3YBidWHxYi2KBOljAiq1Lgsbw?e=1Rq8nX

Form 8 – DoLs Termination of Representative

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/EdcWBtWWaLNAgDN5Y Kl1lY8BYD3fXb-BaAsmPNwoZL-R1A?e=OBU1dE

Form 9 – DoLs Standard Authorisation Ceased

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/EbtH-FidZEVHvGib9jN5T- BOGVoVLEJlzQHwffyWxR88w?e=BrryTc

Form 10 – DoLs Review Request

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/EdPj4iQg0H5KIMbrOUkp ZIUBNCfxMu72U9iaO3qeURrstg?e=HSjcfi

Form 11 – DoLs IMCA Referral

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/EQ6N0Dw6NZxKlBldwics JIIBoSmGTEAYvZ1aK-JHgxmMjw?e=p8lEq7

Form 12 – DoLs Notification to Coroner

https://thedisabilitiestrust.sharepoint.com/:w:/s/thehub/documents/EURAl2RxRwBHgyCdQm 7C6owBDNsWbwCGwnyQNaIby1I-Sw?e=ZRzgnw