

Social Care & Support Practice Bulletin



- ⇒ 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
- ⇒ **All professionals** have a duty to comply with the Mental Capacity Act Code of Practice.

Five Statutory Principals:

1. **A presumption of capacity:** “A person must be assumed to have capacity unless it is established that s/he lacks capacity.”
2. **A right to support in making decisions:** “A person is not to be treated as unable to make a decision unless all practicable steps to help her/him to do so have been taken without success.”
3. **The right to make unwise decisions:** “A person is not to be treated as unable to make a decision merely because s/he makes an unwise decision.”
4. **Best interests:** “An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be in her/his best interests.”
5. **Least restrictive option:** “Before the act is done, or the decision made, regard must be had to whether its purpose can be as effectively achieved in a way less restrictive of the person’s rights and freedoms.”

Having mental capacity means a person is able to make their own decisions!

- ⇒ **You should always** start from the assumption that a person has the mental capacity to make decisions.
- ⇒ **You can only override** the assumption of capacity if the person is assessed as lacking mental capacity to make a particular decision at a particular time.
- ⇒ **You should make every** effort to encourage and support a person to make decisions for themselves
- ⇒ **You cannot assume** someone lacks mental capacity just because they make a decision that you consider to be unwise
- ⇒ **You are always required** to gain a person's consent before carrying out any needs assessment, or providing care or treatment
- ⇒ **Your legal authority** to conduct a needs assessment or to provide care or treatment is derived from a mentally capable person's consent
- ⇒ **You must always respect** a mentally capable person's refusal to care and treatment even if that refusal may have drastic consequences for the person. However in such cases it may be wise to conduct an assessment of someone's mental capacity.
- ⇒ **If you have any reason** to doubt someone's mental capacity to consent to a particular decision at a particular time you are required to make an assessment of their mental capacity. The more serious the decision, the more formal the assessment of capacity needs to be and may require detailed collaboration with other professionals and interest parties
- ⇒ **You cannot make general assessments** of mental capacity; all assessments must be decision and time specific. Capacity might fluctuate and someone may be mentally capable of deciding what to eat but not where to live
- ⇒ **If you** assess someone as lacking capacity in relation to a decision that has long term consequences, that assessment must be reviewed at regular intervals

Assessing capacity

You must not judge a person's mental capacity simply on the basis of their age, appearance, health or other condition or any aspect of their behaviour.

You must take all possible steps to help people make decisions for themselves

Two-stage test of capacity to make decisions.

Stage one (mental capacity)

- ⇒ Does the person have an impairment of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works? (It doesn't matter whether the impairment or disturbance is temporary or permanent.)
- ⇒ If so, does that impairment or disturbance mean that the person is unable to make the specific decision at the time it needs to be made?

Stage two (ability to make decisions)

- ⇒ Does the person understand the decision they need to make and why they need to make it?
- ⇒ Does the person understand the likely consequences of making, or not making, the decision?
- ⇒ Is the person able to understand, retain, use and weigh up the information relevant to the decision?
- ⇒ Can the person communicate their decision (by talking, using sign language or any other means)? You may need help from another professional; such as a speech and language therapist or interpreter etc..
- ⇒ If assessing capacity to make more complex or serious decisions, is there a need for a more thorough assessment (perhaps involving a doctor or other professional or expert)?

Best Interest

Any act done for, or any decision made on behalf of a person who lacks capacity must be in the person's best interests. This is the same whether the person making the decision or acting is a:

- ⇒ family carer
- ⇒ paid carer
- ⇒ Attorney
- ⇒ court-appointed deputy
- ⇒ healthcare professional
- ⇒ and whether it is a minor or major issue

Consulting on Best Interest

If it is practical and appropriate to do so, consult other people for their views about the person's best interests and to see if they have any information about the person's wishes and feelings, beliefs and values.

In particular, try to consult:

- ⇒ anyone previously named by the person as someone to be consulted on either the decision in question or on similar issues
- ⇒ anyone engaged in caring for the person (unpaid or paid)
- ⇒ close relatives, friends or others interested in the person's welfare
- ⇒ any attorney appointed under a Lasting Power of Attorney or Enduring Power of Attorney made by the person
- ⇒ any deputy appointed by the Court of Protection to make decisions for the person.

Who should conduct mental capacity assessment?

- ⇒ The person required to assess mental capacity is **any person** who is proposing to make decisions for or act on behalf of the person in question; this person is known as the **'Decision Maker'**
- ⇒ Different people may be responsible for assessing someone's capacity to make different decisions at different times
- ⇒ The Act does not specify any procedure for assessing mental capacity or provide any statutory forms

You may chose to involve other professionals if:

- ⇒ the relevant decision is complicated or has serious consequences
- ⇒ you conclude a person lacks capacity, and the person challenges your assessment
- ⇒ family members, carers and/or professionals disagree about a person's capacity
- ⇒ there is a conflict of interest between the assessor and the person being assessed
- ⇒ the person being assessed is expressing different views to different people
- ⇒ Somebody challenges the person's capacity to make the decision, either at the time of the decision or later
- ⇒ somebody has been accused of abusing a vulnerable adult who may lack capacity to make decisions that protect them
- ⇒ a person repeatedly makes decisions that put them at risk or could result in suffering or damage.

The ultimate decision about mental capacity is the responsibility of the 'Decision Maker' the role of all other people and professionals is that of advisor.

Before concluding someone lacks capacity you must ask yourself these questions:

- ⇒ Does the person have all the relevant information needed to make the decision?
- ⇒ If they are making a decision that involves choosing between alternatives, do they have information on all the different options?
- ⇒ Would the person have a better understanding if information was explained or presented in another way?
- ⇒ Are there times of day when the person's understanding is better?
- ⇒ Are there locations where they may feel more at ease?
- ⇒ Can the decision be put off until the circumstances are different and the person concerned may be able to make the decision?
- ⇒ Can anyone else help the person to make choices or express a view? e.g. a family member or carer, an advocate or translator

Certain decisions can never be made on behalf of a person who lacks capacity, whether by a family member, carer, professional, attorney or the Court of Protection; these include:

- ⇒ 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
- ⇒ giving consent under the Human Fertilisation and Embryology Act 1990.

How does someone challenge your finding of a lack of capacity?

- ⇒ The first step is to raise the matter with the person who carried out the assessment of capacity.
- ⇒ If the challenge is from the individual said to lack capacity, they might need support from family, friends or an advocate.
- ⇒ If a disagreement cannot be resolved, the person who is challenging the assessment may be able to apply to the Court of Protection. The Court of Protection can then rule on whether a person has capacity to make the decision covered by the assessment

How should you respond?

- ⇒ You should give reasons why you believe the person lacks capacity to make the particular decision at the specific time
- ⇒ You should provide objective evidence to support your assessment
- ⇒ You may want to get a second opinion from an independent professional or another expert in assessing capacity

What protection do you have when caring for those who lack capacity to consent?

Many of our interventions involving vulnerable people could be against the law, as people have a legal right to stop others from interfering with their body or property unless they've given their consent

In most circumstances the Mental Capacity Act provides protection from liability if:

- ⇒ The person is reasonably believed to lack capacity to give consent for the action
- ⇒ The action is in the person's best interests
- ⇒ The intervention followed all the Mental Capacity Act's statutory principles

What if someone refuses to be assessed?

- ⇒ You should explain to someone refusing a capacity assessment why it is needed and what the consequences of refusal are. However threats or attempts to force the person to agree to an assessment are not acceptable.
- ⇒ If you believe the person lacks capacity to agree or refuse, an assessment can normally go ahead, as long as the person does not object to the assessment, and it is in their best interests
- ⇒ Nobody can be forced to undergo an assessment of capacity. If someone refuses to open the door to their home, it cannot be forced.
- ⇒ If you have serious concerns about the person's mental health you may need to consider an intervention under the Mental Health Act 1983

Who should keep a record of mental capacity assessments?

- ⇒ Assessments of capacity to take day-to-day decisions or consent to care require no formal assessment or record. However paid carers should keep a record of the steps they take when caring for the person

Professional records

- ⇒ It is good practice for professionals to carry out a proper assessment of a person's capacity to make particular decisions and to record the findings in the relevant professional records.
- ⇒ You should always start from the assumption of capacity, but when working with vulnerable people it is good practice to explicitly record that while gaining a person's consent, you found no evidence to suggest they lacked the mental capacity to consent to your intervention.

What is an Independent Mental Capacity Advocate (IMCA)?

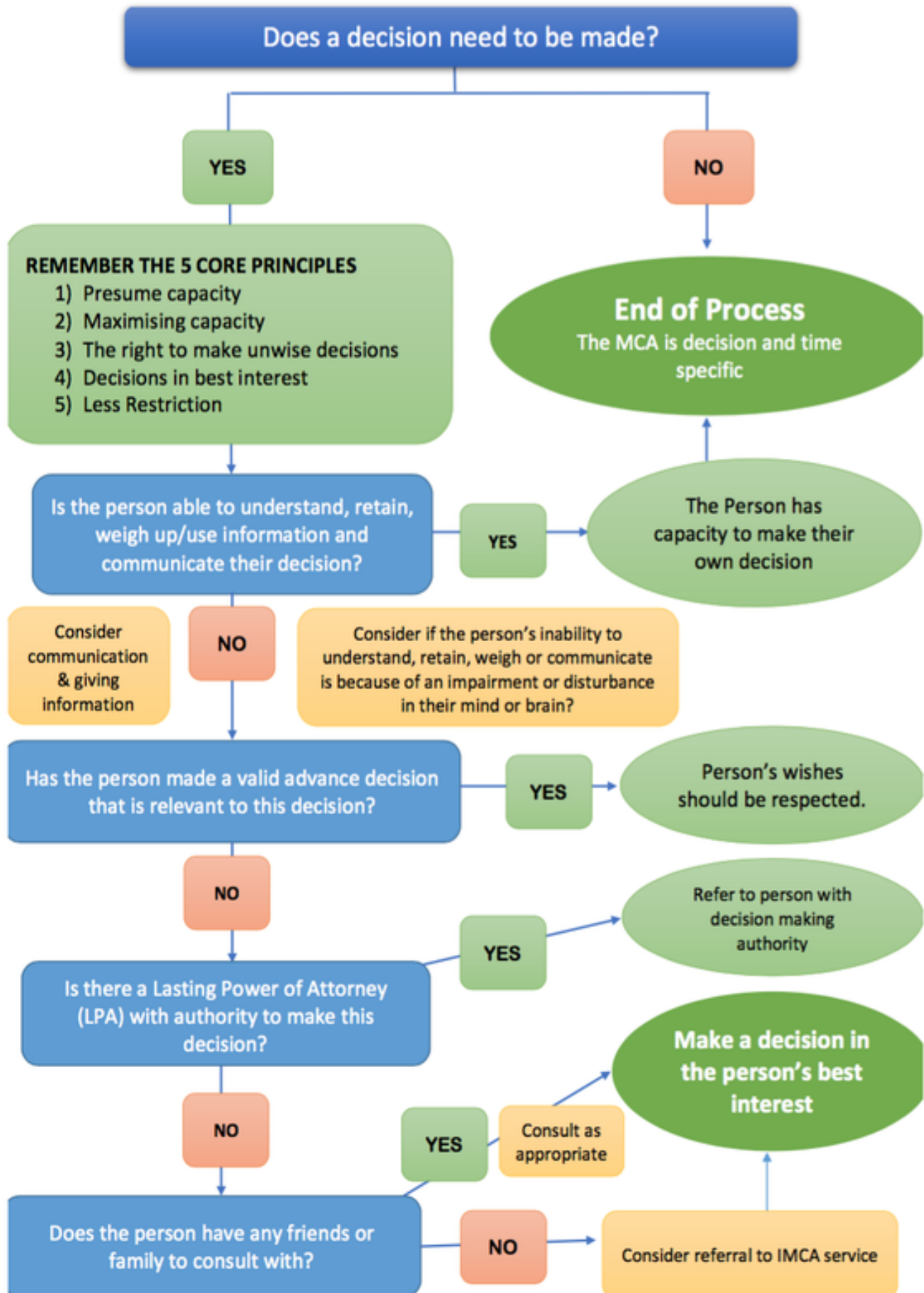
- ⇒ An IMCA provides independent safeguards for people who lack capacity to make certain important decisions who have no-one else (other than paid staff) to support or represent them or be consulted.
- ⇒ IMCA's are commissioned by the local authority but must be independent.

You must refer to an IMCA, and then consult with them whenever:

- ⇒ you make important decisions for someone who lacks capacity and who has no-one else (other than paid staff) to support or represent them or be consulted.
- ⇒ an NHS body is proposing to provide serious medical treatment, or
- ⇒ an NHS body or local authority is proposing to arrange accommodation (or a change of accommodation) in hospital or a care home, and:
 - ⇒ the person will stay in hospital longer than 28 days, or
 - ⇒ they will stay in the care home for more than eight weeks.

An IMCA may also be instructed to support someone who lacks capacity to make decisions concerning:

- ⇒ care reviews, where no-one else is available to be consulted
- ⇒ adult protection cases, whether or not family, friends or others are involved



Advance decisions to refuse treatment?

Enable someone aged 18 and over, who has capacity, to make an advanced decision to **refuse specified medical treatment** for a time in the future when they may have lost capacity to consent or refuse.

If valid and applicable an advance decisions has the same effect as a decision made by a person with capacity and must be respected. However people have no legal right to make an advanced decision that demands specific treatments be provided in the future.

To establish whether an advance decision is valid and applicable, healthcare professionals must try to establish if the person:

- ⇒ has done anything that clearly goes against their advance decision
- ⇒ has withdrawn their advanced decision
- ⇒ has subsequently conferred the power to make that decision on an attorney, or
- ⇒ would have changed their decision if they had known more about the current circumstances.

If the advance decision refuses life-sustaining treatment, it must:

- ⇒ be in writing (it can be written by someone else or recorded in healthcare notes)
- ⇒ be signed and witnessed
- ⇒ clearly state that the decision applies even if their life is at risk.

Healthcare professionals will be protected from liability if they:

- ⇒ stop or withhold treatment because they reasonably believe that a valid and applicable advance decision exists
- ⇒ treat a person because, having taken all practical and appropriate steps they have been unable to establish if a valid and applicable advance decision to refuse treatment exists

Lasting power of attorney (LPA)

Introduced 1st October 2007 the (LPA) is a legal document that allows a person who is 18 or over and has the mental capacity to do so **(the 'donor')** appoint one or more people **(‘attorneys’)** to help them make decisions or to make decisions on their behalf.

An LPA gives people more control over what happens to them if they have an accident or an illness and can't make their own decisions ('lack mental capacity')

LPA's must be registered with the Office of the Public Guardian (OPG)

Health and welfare lasting power of attorney

- ⇒ gives an attorney the power to make decisions about things like:
 - ⇒ daily routine, for example washing, dressing, eating
 - ⇒ medical care
 - ⇒ moving into a care home
 - ⇒ life-sustaining treatment

Can only be used when donor is unable to make their own decisions.

Property and financial affairs lasting power of attorney

- ⇒ gives an attorney the power to make decisions about money and property for people, for example:
 - ⇒ managing a bank or building society account
 - ⇒ paying bills
 - ⇒ collecting benefits or a pension
 - ⇒ selling your home

Can be used as soon as it's registered, with the donors permission

Enduring power of attorney (EPA)

EPA's were replaced by LPA's 1st October 2007

- ⇒ Only cover legal and financial matters
- ⇒ Are registered (and can be used) if the donor loses capacity
- ⇒ EPA's signed prior to 1st October 2007 are still valid
- ⇒ Since 1st October 2007 new EPA's cannot be created

The Office of the Public Guardian can tell you if someone has a valid LPA

The Deprivation of Liberty Safeguards

The deprivation of liberty safeguards (DOLS) are an amendment to the Mental Capacity Act 2005 and provide legal protection for vulnerable people who lack capacity and who are, or may become, deprived of their liberty in **hospitals or care homes**.

Under DOLS a person may only be deprived of their liberty if:

- ⇒ its in their own best interests
- ⇒ to protect **them** from harm (not others)
- ⇒ it is proportionate to the likelihood and seriousness of the harm
- ⇒ there is no less restrictive alternative.

A deprivation of Liberty outside of a hospital or care home will usually be authorised by the Court of Protection

Deprivation of liberty must never be used as a form of punishment, or for the convenience of professionals, carers or anyone else

Deprivation of liberty in a hospital or care home is only lawful following a 'standard' or 'urgent' authorisation processes.

Urgent authorisation process is where the manager of a hospital or care home effectively 'self-authorises' the deprivation while an application is made to the **Supervisory Body** (Local Authority)

- ⇒ Can only be applied in urgent cases
- ⇒ Only lasts seven days

Standard authorisation can only be granted by the Supervisory body following the completion of a 6 part DOLS assessment

- ⇒ The period of authorisation is specified in the DOLS order but can be up to 12 months

If you're arranging a placement that is likely to deprive someone of their liberty, you must take all reasonable steps to ensure a Standard Authorisation is sought before the placement begins

How do I know if someone is or might be deprived of their liberty?

The original DOLS amendment to the Mental Capacity Act did not attempt to define 'Deprivation of Liberty' however in 2014, the Supreme Court ruled that when deciding if someone might be deprived of their liberty you should ask two questions:

- ⇒ Is the person subject to continuous supervision and control?
- ⇒ Is the person free to leave?

The person may seem happy to stay, but the issue is about how staff would react if the person tried to leave. If a person lacking capacity to consent to the arrangements is subject both to continuous supervision and control and not free to leave, they are deprived of their liberty.

It may not be a deprivation of liberty, if the person is not free to leave, but is not supervised or monitored all the time and is able to make decisions that are not subject to agreement by others.

The Supreme Court ruled that the following factors are not relevant to whether or not someone is deprived of their liberty:

- ⇒ the person's compliance or happiness or lack of objection
- ⇒ the suitability or relative normality of the placement (after comparing the person's circumstances with another person of similar age and condition)
- ⇒ the reason or purpose leading to a placement

Even when urgent or standard authorisations are in place:

- ⇒ Care plans must show evidence of best interests decision-making in accordance with the Mental Capacity Act, based on decision-specific capacity assessments.
- ⇒ You must ensure that any restrictions on the freedom of anyone lacking capacity to consent to them, are proportionate to the risk and seriousness of harm to that person
- ⇒ You must provide evidence that no less restrictive options can be identified
- ⇒ Authorisation does not require the individual to be deprived of their liberty and does not order the person to be detained; it means a person or body that may have to deprive the individual of their liberty are acting lawfully

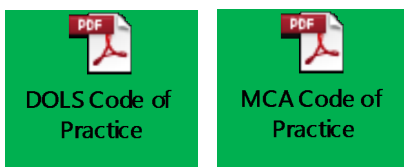
This practice bulletin is intended to provide summary information about the Capacity Act 2005 and is not intended to replace the guidance contained in the relevant codes of practice (CoP).

The Mental Capacity Act 2005 provides a statutory framework for acting and making decisions on behalf of individuals who lack the mental capacity to do so for themselves.

Both the Mental Capacity Act and DOLS have statutory Codes of Practice and **you are under a legal duty to have regard to them.** This means your practice must clearly reflect the guidance contained in the Codes.

While there is no legal duty to 'comply' with Codes of Practice, if you do not follow their relevant guidance you will be expected to provide good, clear reasons why!

As with the 2014 Supreme Court ruling on DOLS the interpretation of legislation and how it requires professionals and others to act changes over time, and this may not always be reflected in current Codes of Practice. It is therefore important that adult social care staff make every effort to keep their knowledge of legislation up to date. There are many ways practitioners can do this and links to examples of useful resources are below:



<https://www.gov.uk/government/collections/dh-mental-capacity-act-2005-deprivation-of-liberty-safeguards>

<http://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty/>

<http://www.39essex.com/>