



**Durham
Safeguarding Adults
Partnership**



**The Mental Capacity Act
and safeguarding adults:
what good looks like.
About Capacity, the Act,
and the Court of Protection**



**All about the
Mental
Capacity Act
2005 and
safeguarding
adults in a
bitesize series:
more soon.**

**Click on a topic
to go straight
there.**

Contents

Why this topic?	2
About Capacity	2
Human Rights are for everyone	3
What is the Mental Capacity Act?	3
The Deprivation of Liberty Safeguards (DoLS)	5
The two Codes of Practice and case law	5
Who assesses capacity and who is the decision maker?	6
The Court of Protection	6
The interface between the MCA and the Mental Health Act	8
Future changes: Liberty Protection Safeguards	9
Resources	10

Why this topic?



[Analysis of Safeguarding Adult Reviews: April 2017 - March 2019 | Local Government Association](#)

A National Analysis of 231 Safeguarding Adult Reviews was published in December 2020. Safeguarding Adult Reviews (SARs) take place where an adult has died or been seriously harmed, and there has been abuse or neglect, in order to learn about practice improvements and working better together.

The National Analysis found that nearly all SARs identify a lack of use of the Mental Capacity Act (MCA) 2005 or it not being used properly, in particular: capacity assessments, best interests decisions, and (respectful) challenge of decisions.

How the MCA supports the protection of staff

The MCA if used properly protects staff from civil liability for loss or damages and /or criminal prosecution, for instance for trespass, assault, battery, false imprisonment, and theft. Staff must take reasonable steps to establish if the person lacks capacity and must reasonably believe the person lacks capacity about the matter, and that it is in their best interests for the action to be taken (MCA Section 5).

The MCA does not give any protection from the use of force or restraint unless it is proportionate to prevent harm, properly using the relevant sections of the MCA.

About Capacity

“Mental capacity is the ability to make a decision”.



“A person’s capacity (or lack of capacity) refers specifically to their capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken.”

Mental Capacity Act Code of Practice,

Capacity is a legal definition, not a medical diagnosis

How many people might lack capacity at some level?

NICE guideline reports CQC estimates:



There are two million adults in England and Wales who lack capacity for some decisions



There are 800,000 people with dementia and learning disability who are at most risk



246,000 completed DoLS applications reported by local authorities in England in 2020/21



There are about 16,000 people in a persistent vegetative state

Human Rights are for everyone

The MCA, the Codes of Practice and much of the work of the Court of Protection turns on upholding a person's human rights.



“A conclusion that a person lacks decision-making capacity is not an ‘off-switch’ for his rights and freedoms.”

Wye Valley NHS Trust v Mr B, [Capacity is not an off-switch – Mental Capacity Law and Policy](#)



“Human rights are for everyone, including the most disabled members of our community, and that those rights include the same right to liberty as has everyone else...The whole point about human rights is their universal character...They are premised on the inherent dignity of all human beings whatever their frailty or flaws...”.

https://www.supremecourt.uk/cases/docs/UKSC_2012_0068_Judgment.pdf

Everybody carrying out a statutory function – that is, employed by or commissioned or funded by the statutory sector, must protect an individual's human rights, including when people are at risk from another person, and including those of a person alleged to have caused the harm.

The Human Rights Act 1998 sets out the Articles of the European Convention on Human Rights.

The Articles particularly relevant to the Mental Capacity Act are:

2. Right to life
3. Freedom from torture and inhuman or degrading treatment
5. The right to liberty and security
8. Respect for your private and family life, home, and correspondence.
12. Right to marry and start a family
14. Protection from discrimination in respect of these rights and freedoms



See also the [British Equality and Human Rights Commission](#)

What is the Mental Capacity Act?

The Mental Capacity Act 2005 (MCA) covers England and Wales and was implemented in 2007. It creates a statutory framework for:



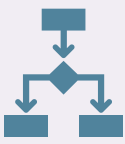
people who lack capacity to make decisions for themselves



people who have capacity and want to prepare for a time when they may lack capacity in the future

The Mental Capacity Act:

- Sets out who can take decisions, in which situations, and how they should go about this;
- Provides protection for people who care for people who do not have the capacity to agree to the care or treatment being provided for them;
- Supports people with impaired capacity to be involved as much as possible with decisions and to be restricted as little as possible;
- Introduced criminal offences of wilful neglect and ill treatment which apply to anyone caring for or working with someone who lacks capacity – family members, a partner, attorneys or deputies, health and social care staff, housing, police and other professionals;
- Created the Court of Protection.



The five Mental Capacity Act 2005 Principles

There are five statutory principles in Section 1 of the Mental Capacity Act which must be used before and during a capacity assessment, and during the Best Interests decision making process.

Capacity Assessment

Section 2 of the MCA defines when and why a person lacks capacity to make a decision, take action, give consent to or refuse medical treatment or care, or consent to a contract such as a tenancy. Section 3 sets out the questions to ask in order to assess if a person is able or unable to make a decision at the time it needs to be made.



[See the Capacity Assessment guide in this series.](#)

Best Interests Decision Making Process

The process and matters that must be considered in the Best Interests decision making process are set out in Section 4 of the Act.



[See the Best Interests Decision Making Process guide in this series.](#)

MCA applies to people aged 16 years and over with three exceptions:

- 1** Only people aged 18 years or over can make a Lasting Power of Attorney (LPA) or be an attorney;
- 2** Only people aged 18 years or over can make advance decisions to refuse medical treatment (a Living Will);
- 3** The Court of Protection may only make a statutory will for a person aged 18 and over.

Where the MCA applies to under 16's:

- The MCA criminal offences of ill treatment or wilful neglect apply to carers of children aged under 16 (as children under 16 do not have capacity under the Act);
- The Court of Protection can make decisions about property and finance if a child under 16 will not have capacity when they turn 18.

The Deprivation of Liberty Safeguards (DoLS)

If care and treatment circumstances add up to a deprivation of a person's liberty, which is a breach of a person's human rights, it must be authorised and made legal.

The Deprivation of Liberty Safeguards (DoLS) is an amendment to the MCA.

- It applies when a person aged 18 and over lacks capacity to consent to their care or treatment, and lives in a care home or hospital.
- It applies to both state arranged and privately arranged care or treatment.
- DoLS provides the person with legal protection from being deprived of their liberty unless it is in their best interests and there is no less restrictive alternative.
- The managing authority must apply; that is an NHS hospital manager or private hospital or care home manager.
- The local authority or a Clinical Commissioning Group (CCG) have the role of authorising a deprivation of liberty in their roles as supervisory bodies.
- DoLS is in [Schedule A1](#) to the Mental Capacity Act 2005.

A DoLS authorisation does not authorise other care or medical treatment, e.g. a flu jab.

If a person's care and treatment outside hospital or a care home amounts to a deprivation of liberty, or they are aged 16 or 17 wherever they are (parents cannot consent for 16- and 17-year olds as capacity is assumed at 16), it must be taken to the Court of Protection for a court order.



See more about deprivation of liberty in the **Best Interests Decision Making Process** guide in this series.

The two Codes of Practice and case law

The MCA is supported by a statutory Code of Practice published in 2008. Staff working with or caring for adults who lack capacity to make decisions for themselves have a legal duty to consider the MCA Code of Practice.



[Mental Capacity Act Code of Practice - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

DoLS is supported by a DoLS statutory Code of Practice, published in 2008 which staff carrying out function of the deprivation of liberty safeguards have a duty to have regard to.



[12369 Mental Capacity 18th.indd \(cqc.org.uk\)](http://cqc.org.uk)

Case law determined since the Act was implemented in 2007 and the two Codes of Practice were published in 2008 clarifies what the Act means and how it should be applied. Professionals should have regard to the relevant case law.

A 39 Essex Chambers guidance note on the MCA and DoLS Codes of Practice includes relevant case law that supersedes the existing MCA and DoLS Codes of Practice. It was updated in February 2022.



[39 Essex Chambers | Mental Capacity Act/ DOLS Codes of Practice Update](#)

Who assesses capacity and who is the decision maker?

It depends...who wants a decision made, action taken, or consent given?

The person assessing someone's capacity to make a decision and then the Best Interests decision maker for someone without capacity for the decision may be:

- Family members;
- An attorney appointed by an active Lasting Power of Attorney for personal welfare including healthcare, or financial affairs, or a court appointed welfare Deputy, who can make Best Interest decisions, but only as set out in their powers by the Court of Protection;
- The relevant consultant, health care or social care professional, housing officer, police officer or other professional in a Best Interests decision, having assessed a lack of capacity for that decision at that time;
- to authorise a deprivation of liberty using the DoLS, a registered professional in a local authority (the supervisory body); may be a social worker, an OT;
- The Court of Protection.

Some examples

- a Consultant seeking consent about chemotherapy;
- Family member or care worker about suitable clothes to wear in cold weather;
- The professional on the doorstep who wants consent to go into someone's home;
- Housing Officer about making a tenancy agreement;
- Social worker about smoking, fire risk and use of a smoking apron.



“What this means is that a range of different decision-makers may be involved with a person who lacks capacity, to make different decisions”

Code of Practice

The Court of Protection

The Court of Protection was established by the Mental Capacity Act with an obligation to protect both the person and the person's autonomy. In most cases, capacity assessments and best interest decisions do not go to court. But the court role includes setting standards for cases in the community and in clinical settings

- The usual decisions that the Court of Protection will consider when deciding whether somebody has mental capacity are:
 - residence

- care
- medical treatment
- contact
- finances
- use of social media
- capacity to consent to or engage in sexual relations
- capacity to consent to marriage or civil partnership.
- The Court can provide a swift remedy – there is 24-hour access to a Court of Protection Judge who can make urgent orders.

Where the Court finds a person lacks capacity, it can:






- direct protective measures in someone's Best Interests,
- authorise deprivations of liberty,
- direct for work to help someone maximise their functioning and potentially gain capacity in the future.

The Court of Protection threshold for action is a balance of probabilities in Best Interests – this is lower than proving a criminal offence in the criminal justice system.

- While focused on protecting the person, not the punishment of others for wrongdoing, the Court can make directions and orders to remove people, prevent contact, and have monies returned.
- Situations must always go to Court if there is a dispute that cannot be resolved and must go in a timely way.

What is a dispute?


Recognizing that the situation is a dispute is essential to ensure cases go to court as and when they should. Some examples of disputes from recent cases include:

-  **Daughter saying Mrs V should not have a Covid-19 vaccination**
-  **Medical consultants have differing views about the best course of treatment**
-  **A person does not want to move out of hospital to supported living**
-  **Husband would not allow medical staff to assess and treat his wife's life-threatening condition**
-  **Local authority would not allow previous care worker to have contact with person when they turned 18.**

Alex Ruck Keene from 39 Essex Chambers has written a basic guide to the Court of Protection for the Open Justice Court of Protection Project.

 [Open Justice Court of Protection-a basic guide to the court of protection](#)

The Government has produced guidance and forms to complete when applying to Court to make Best Interests decisions on someone's behalf.

 [Court of Protection forms and guidance - GOV.UK \(www.gov.uk\)](#)

The interface between the MCA 2005 and the Mental Health Act 1983, amended 2007

The interface between the Mental Capacity Act and the Mental Health Act is complex.

The MCA is about a person's functioning, the assessment of capacity to make a decision about a wide range of matters which is a legal definition, and then if a person lacks capacity for a decision, deciding what is in their Best Interests.

This is not the same as when a person has a diagnosis of a disability or disorder of the mind which requires assessment and treatment for a clinically recognised condition which could fall under the Mental Health Act (MHA) 1983, which may include detention, and which may also be to prevent harm to others.

Some people who lack capacity to make decisions have a disturbance or impairment of the brain or mind that does not come within the meaning of the MHA, for example a person who is unconscious after a stroke, confused with sepsis or another infection, or who is dependent on alcohol or drugs and there is no other mental disorder.



Simply being detained for assessment and treatment under the MHA does not mean people lack capacity to make decisions, whether or not they agree with the MHA compulsory measures; clinicians should include them in the process throughout their detention as their capacity may alter through the treatment process.

Similarly, a person may lack insight and capacity around their mental health, but have capacity around a physical health issue, for example to give consent over treatment for a broken leg.

Under both Acts the least (MHA) or less (MCA) restrictive options should be considered, and the person supported to be involved as much as possible in decision making.

Sometimes both Acts must be used, for example:



a person detained under the MHA for their mental disorder, may also be assessed as lacking capacity to make financial decisions under the MCA.



a voluntary patient (non-detained) under the MHA may lack capacity to consent to or refuse their mental health treatment; then MCA capacity assessment and the Best Interests process must be used.

Both Acts could be used to authorise a deprivation of liberty in hospital settings if a person does not have capacity and does not object to the treatment. Decisions should be made as to which is appropriate for the individual's circumstances; both Acts cannot be used at the same time to authorise a deprivation of liberty.

If the person has a mental health disorder and requires treatment in hospital, and this is in their best interests to prevent harm to themselves or to others, generally the MHA applies not the MCA, and always if the person objects to treatment, always if the person is a compulsory patient under the MHA.

MCA Section 28 explanatory notes:



“This deals with the question of people who are detained for psychiatric treatment pursuant to the Mental Health Act 1983. The section ensures that the Mental Capacity Act does not apply to any treatment for mental disorder which is being given in accordance with the rules about compulsory treatment set out in Part 4 of the 1983 Act. The specific statutory safeguards which the 1983 Act gives in relation to compulsory psychiatric treatment must always be afforded to those patients to whom that Act applies.”

Under the Mental Health Act if a person requires treatment outside hospital for a mental health disorder, the Act only applies to treatment. Conditional discharges and Community Treatment Orders cannot legally be made with conditions that amount to a deprivation of liberty.



People with capacity over their care, treatment, and residence cannot be deprived of their liberty under the Mental Capacity Act.

If a person does not have capacity about their care and treatment and is deprived of their liberty using the DoLS under the MCA, this does not authorise any medical treatment.



Treatment would be authorised under the Mental Health Act for a mental disorder.



Outside the MHA, for physical healthcare such as a flu jab, treatment for depression by a GP or other clinical care, the MCA Best Interests decisions making process should be used.

A recent Coroner's Prevention of Future Deaths Report states:



'...the jury found that if **an adequate assessment of Emily's capacity** had taken place, she would have been given IM Lorazepam "in best interests", that this would have quickly relieved her anxiety and distress, and that her death would probably have been prevented.'



[Emily Caldicott: Prevention of future deaths report | Courts and Tribunals Judiciary](#)

There is guidance under the revised MHA Code of Practice 2015 including an options grid for using the MHA or MCA DoLS, figure 5 on page 106.



[Code of practice: Mental Health Act 1983 - GOV.UK \(www.gov.uk\)](#)

39 Essex Chambers have produced a guidance note on the interface between the Mental Capacity Act, the Mental Health Act 1983, and deprivation of liberty in hospital.



[Deprivation-of-liberty-in-the-hospital-setting-November-2019.pdf \(netdna-ssl.com\)](#)

Research by the King's Fund has found that staff tend to use the Act that they are most familiar with rather than whichever is most appropriate.

Future changes: Liberty Protection Safeguards

The Mental Capacity (Amendment) Act 2019 [Mental Capacity \(Amendment\) Act 2019 \(legislation.gov.uk\)](#) will introduce Liberty Protection Safeguards (LPS) which will replace DoLS and apply to people aged 16 and over who lack capacity to consent to their arrangements, and will extend to community settings.



Implementation is delayed due to Covid-19.



A new Code of Practice combining the MCA Code of Practice, case law since 2007 and the new Code for the Liberty Protection Standards was published for consultation before implementation.



The March 2022 newsletter from the DHSC includes a timeline which means it is unlikely that LPS will be implemented until late 2023.

Consultation on single Code of Practice

The MCA Code of Practice and LPS regulations consultation closes on 14 July 2022 (extended from 7 July 2022). There are also LPS implementation documents.



[Changes to the MCA Code of Practice and implementation of the LPS - GOV.UK](https://www.gov.uk/government/consultations/changes-to-the-mca-code-of-practice-and-implementation-of-the-lps)
(www.gov.uk)

Or



<https://www.gov.uk/government/consultations/changes-to-the-mca-code-of-practice-and-implementation-of-the-lps>

Tim Spencer-Lane from 39 Essex Chambers has written a guide to the draft Code of Practice; key changes include updated guidance on the capacity test, fluctuating capacity and best interests decision making.



[Guide to the draft MCA code of practice - Community Care](#)

Tim Spencer-Lane has also written a summary on the way the government plans to implement the Liberty Protection Standards.



[How the government plans to implement the Liberty Protection Safeguards - Community Care](#)

Resources

39 Essex Chambers' series of guidance notes are on



[39 Essex Chambers | Mental Capacity Guidance Notes Archives - 39 Essex Chambers](#)



[The Mental Capacity Act 2005](#)



[MCA Statutory Code of Practice](#) Staff working with or caring for adults who lack capacity to make decisions for themselves have a legal duty to consider the MCA Code of Practice.



The Mental Capacity Act and safeguarding adults, what good looks like.
Practice guides in this series

- 1. What is capacity, the MCA, who uses it? The Court of Protection (this one)**
- 2. Capacity assessment process**
- 3. Challenges in capacity assessment e.g. fluctuating capacity, reluctance to engage**
- 4. Preferred communication (for all practicable support)**
- 5. Top tips, with a working example of safeguarding when capacity is a feature**
- 6. Assessment form sample and expected standards**
- 7. Next of Kin, Living Wills, Attorneys, and the role of the Office of the Public Guardian**
- 8. Best Interests decision making process**