Mental Capacity Act (MCA) practice guidance

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Introduction

Part 2 The Principles -

Mental Capacity Act section 1; Code of Practice Chapter 2

1. A person must be assumed to have capacity unless it is established that s/he lacks capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because s/he makes an unwise decision
4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done or made, in his/her best interest.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

What do the Principles mean?

The five Principles of the Mental Capacity Act (MCA) are part of the legislation, so it is a legal obligation to respect these Principles whenever MCA is used.

Principle 1: The Principles assume capacity. Unless you have evidence that someone lacks capacity, you must assume that they can make their own decision. If there are doubts about someone's capacity this must be assessed rigorously, and you need to find the evidence about their capacity. (Part 6: How to assess capacity)

Principle 2: You need to do everything you realistically can to enable someone to make their own decision. For instance, make sure they are comfortable; explain the information in as many ways as possible, use different communication methods and visit as often as possible. (Part 6: How to assess capacity)

Principle 3: Everyone makes decisions which might seem unwise to other people. An unwise decision should not be taken as an indication of someone's capacity. For instance, someone may refuse treatment or care which they clearly need. If they have capacity to make this decision this is their right and they can refuse up to the point of death: if they lack capacity others will need to make a best interests decision for them. The person's capacity for the decision must be carefully assessed and their refusal must not be used as evidence of a lack of capacity. (Part 8: Best interests decisions)

Principle 4: Everything done under MCA must be done in the interests of the individual. This means that a best interests decision made under MCA must be in that person's

interests and not in the interests of their family, of other people on the ward or the general public. (Part 8: Best interests decisions)

Principle 5: Anything done under MCA must be the minimum action necessary, must allow the person as much freedom of choice as possible and must follow their wishes as closely as possible. (Part 8: Best interests decisions)

Part 3 Scope of the MCA -

Code of Practice chapter 1

Who needs to follow the Mental Capacity Act?

Everyone working with, living with or caring for someone who may lack capacity must follow the Mental Capacity Act (MCA) and the Code of Practice.

Professionals need to record their decisions formally, but informal carers also need to abide by the principles and procedures of the MCA.
(Part 24: MCA and family and informal carers) (Part 10: How to record decisions)

Who does MCA apply to?

The MCA applies to everyone over the age of 16 who may lack capacity to make a particular decision at a particular time. There are some specific sections that only apply to people over 18, but most of the legislation applies to everyone over 16. (Part 22: The legal position of 16-18 year olds)

What sort of loss of capacity does MCA apply to?

The MCA applies to any possible loss of capacity – so to someone who is temporarily drunk and to someone who has profound learning disabilities. If a decision needs to be made the question is about someone's ability to make that decision at that point in time. (Part 6: How to assess capacity)

Which decisions can be made under MCA?

The MCA can be used to make nearly all decisions for someone who lacks capacity. Everything from what to have for lunch, to where to live, to what medical treatment to have to how to spend your money can be decided under MCA.

This places considerable responsibility on people making these decisions, but the MCA does not give more power. Decisions have always been made for people who can't make them for themselves: the MCA provides a legal framework for ensuring the decisions are made and recorded in a consistent and transparent way.

The MCA applies to nearly all decisions. If someone doesn't have capacity to make their own decisions the MCA processes must be used and recorded, even if the person is able to co-operate and is happy to go along with what is proposed.

There are some decisions which are excluded from MCA – decisions which cannot be made under the best interests process. These are listed in MCA s27and Code of Practice 1.10. They include consenting to sexual relations, voting, consenting to the adoption of a child or making other decisions about a child, consenting to marriage or civil partnership, consenting to divorce on the grounds of two years separation or any actions connected to assisted suicide, manslaughter or murder. (Part 6: How to assess capacity) (Part 8: Best interests decisions) (Part 10: How to record decisions)

What about emergencies?

The Principles of MCA should always be followed. However in an emergency it may not be possible to assess capacity or to find out necessary information. The law regarding emergency treatment remains unchanged by MCA; the common law doctrine of necessity is still valid, allowing emergency treatment and care to be given. (Part 29: Emergencies)

How does MCA relate to policies about consent held by hospital trusts?

The MCA underpins all decision-making processes, so any consent policy will have been written to comply with MCA. (Part 28: Consent and implied consent) (Part 14: Restraint)

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Part 4 How MCA helps people plan for the future -

Code of Practice chapter 7 and chapter 9

No-one knows when they might lose capacity. Anyone may lose capacity through illness or injury and some people may know that they have a condition which will lead to a loss of capacity.

The Mental Capacity Act (MCA) enables everyone to lay out their wishes for a time when they lack capacity, by making Advance Decisions, Advance Statements or donating a Lasting Power of Attorney (LPA) (Part 17: Advance Decisions and Advance Statements) (Part 19: Lasting Powers of Attorney)

If someone is in the early stages of a deteriorating illness it is good practice for them to be advised to make plans for their future.

If someone doesn't have capacity to make decisions about who they would like to make decisions for them, then that person can't make any Advance Decisions or nominate an LPA. If they have a considerable amount of money or property it is appropriate for an application to be made for the Court of Protection to appoint a deputy to manage their financial affairs for them. (Part 26: People who lack capacity to manage their money)

The Court of Protection has the power to appoint a Welfare Deputy to make decisions about someone's health and welfare. Such appointments are rare: it is more common for decisions to be made using the best interests process, as each decision arises. (Part 8: Best interests decisions) (Part 23: The Court of Protection)

It is vital that everyone is helped to make plans as they approach the end of life.

If someone has capacity, they should be advised to consider making Advance Decisions, including decisions about whether they would wish resuscitation to be attempted if they have a cardiac arrest.

A Treatment Escalation Plan should be considered if someone has complex needs and there may be disagreement about what medical treatment they should be given. This is completed by the medic in charge of their care, in consultation with family or friends and others who know the person and considers what is known about their past and present wishes. (Part 18: End of life care and decision-making)

Part 5 How MCA helps people be involved in their own decisions -

[MCA section 1; Code of Practice chapters 2 and 3]

The MCA is based on the idea that people should make decisions for themselves whenever possible.

Principle 1: A person must be assumed to have capacity unless it is established that s/he lacks capacity.
Despite someone's age, appearance or behaviour; and despite their diagnosis or the apparently unwise decision they may make – there must always be an assumption that everyone can make their own decisions. If there is doubt about someone's capacity this must be rigorously assessed before acting on an assumption of capacity.

Principle 2: A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success.
It is the responsibility of whoever is seeking to make a decision to do everything they can to help the person to make their own decision. This would include help with communication, explaining information clearly, making sure the person is comfortable, has whatever support they want and is as well as they can be.

By introducing decision-specific capacity assessments, the MCA ensures that people are able to make whichever decisions they can. For instance, someone may not be able to make a decision about their money, but may be able to decide about medical treatment. They may not be able to decide where they should live, but may be able to decide what they wear and how they spend their time. The MCA requires separate decision-making assessments to be made for separate decisions, instead of a global decision about someone's capacity. This means that most people can make some decisions for themselves. (Part 6: How to assess capacity)

If it has been decided that someone can't make a specific decision for themselves they still need to be involved in the best interests decision. The best interests checklist (MCA section 4; Code of Practice 5.21- 5.24) makes sure that people are involved in decision-making. They may be able to express an opinion, say what they would like to happen or discuss details of the decision. For instance, someone may not be able to make their own decision about moving into residential care, but may then be able to comment on where they would like to live, whether they want to go somewhere where there are pets or whether they want to be able to go into a garden. A decision-maker must consider what is known about the person's wishes. (Part 8: Best interests decisions)

Involving someone in their best interests decision is about respect. It enables people to

feel valued, and to understand that there is a legal process being followed.

A decision-maker has a duty to consider as much as possible what is known about someone's past wishes, values and opinions. Some people will make Advance Decisions and Statements; for others the decision-maker will need to find out what they can about someone's views. This information should inform the decision-making. (Part 17: Advance Decisions and Advance Statements) (Part 8: Best interests decisions)

The MCA also gives people the right to nominate someone they would like to make decisions for them if, at a future date, they become unable to make decisions for themselves. This is by nominating a Lasting Power of Attorney. (Part 19: Lasting Power of Attorney)

When making decisions it is important to consult the person's family and friends. If a significant decision is being made, such as a change of accommodation or serious medical treatment, and the person has no-one who can be consulted a referral must be made for an Independent Mental Capacity Advocate (IMCA) who can make sure the person's views are fully represented. (Part 15: Independent Mental Capacity Advocates)

Part 6 How to assess capacity -

[MCA section 2-3; Code of Practice chapter 4]

What is capacity?

The MCA defines a lack of capacity as:

> ‘a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.’

(MCA section 2(1); Code of Practice 4.3).

Capacity relates to a particular decision at a particular time. In the past, someone’s ‘capacity’ was assessed in an overarching way and a general statement was made that ‘Mrs X lacks capacity’ – and then all decisions were made for Mrs X. The MCA makes this practice unlawful.

The test

The MCA introduces a two step process of assessing someone’s capacity.

Step 1: The diagnostic test
The first step is known as the diagnostic test. This means looking for evidence that the person is suffering from; ‘an impairment of, or a disturbance in, the functioning of the mind or brain.’ This is a very wide gateway which would include any form of:

- learning disability
- mental illness, including dementia
- brain injury, including stroke damage
- neurological damage,
- intoxication – from chronic drug use to a couple of glasses of wine
- temporary confusional state caused by infection, illness, tiredness or pain

(Code of Practice 4.12).

Most people at some time will be covered by this diagnostic test and some people will always come within it. This doesn’t necessarily mean that they lack capacity to make a particular decision at a particular point in time.

Step 2: The decision-specific functional test
This test considers whether the person can make this decision at this time. This is because you need different understanding to make different decisions. For instance, someone may not have capacity to manage their money, but may be able to make a decision about their medical treatment; they may not be able to make a decision about where they live but may be able to decide how they spend their time.

The first step of the functional test is to be clear what the decision is that needs to be made. If there is a complex situation there may need to be several capacity assessments concerning different decisions.

The assessor then needs to establish if the person can:

- understand the information relevant to the decision
- retain information relevant to the decision
- use or weigh the information as part of the process of making the decision
- communicate their decision.

(MCA section 3; Code of Practice 4.14)

If the person is unable to do any one of these four things, they lack capacity to make this decision at this time.

Make sure the person has access to all the relevant information about the decision and is helped to consider all the subtleties of the decision they need to make

The person only needs to be able to retain information long enough to use it to make the decision – there isn't a requirement for longer term memory.

To be able to use or weigh the information someone needs to be able to consider conflicting information: for example: 'I've always wanted to stay in my own home, but if I fall I might be on the floor all night before anyone finds me'. They have to be able to understand the risks and consider the consequences of their decision

The ability to communicate the decision is by any means – sign language or body language would be acceptable. (Code of Practice 4.15-25)

When should I assess?

If there is a possibility of someone recovering their capacity to make the decision – if they lack capacity because of an infection causing confusion – then the decision should

wait, if it is safe to do so. Some decisions can't wait; for example a decision about the medical treatment which might enable someone to regain their capacity. However, if at all possible, decisions should be delayed until the person has the best chance of making their own decision. (Code of Practice 4.27; 5.25-5.27)

Your duty to enable someone to make their own decision

Following Principle 2 it is your responsibility to do everything you can to give a person the best chance of being able to make their own decision.

Make sure you:

- are clear about the decision
- are clear about the information the person needs to understand and consider – someone making a decision about living independently would need information about the care package they might receive, how long between visits, how extensive their support would be, the risks of living independently, the options for living in care and so on
- are able to communicate this information in a way most likely to enable the person to understand
- have thought about how the person is best able to communicate – do you need an interpreter, help from audiology department, a speech and language therapist or other specialist?
- consider the best time of day to do the assessment and the best location
- have thought about whether the person should have someone with them – a family member may help them to feel more comfortable or may inhibit what they say
- repeat the information if necessary or visit the person more than once.

Part 7 Being a decision-maker -

[Code of Practice chapter 5.8-5.12]

What does decision-maker mean?

The MCA does not lay down professional roles or require certain qualifications to undertake assessments. The capacity assessment should be done by the person who is proposing to undertake an action or make a decision. This person is the decision-maker.

Who is the decision-maker?

Family members and informal carers will be decision-makers for actions that they undertake. A care assistant will be the decision-maker if the decision is, for instance, about what clothes to put on that morning. They would not be expected to complete a formal capacity assessment, but to have a ‘reasonable belief’ that the person lacks capacity for those decisions. (Code of Practice 4.44) (Part 24: MCA and family and informal carers) (Part 25: MCA and untrained workers)

Professionals are the decision-makers for actions they are responsible for. A doctor or other health professional will be the decision-maker about someone’s capacity for the treatment they are prescribing, or initiating a care pathway. A nurse will be the decision-maker about the treatment or care that they are delivering or administering. A social care professional will be the decision-maker about a move into residential care or commissioning a package of care. (Part 6: How to assess capacity) (Part 8: Best interests decisions) (Part 10: How to record decisions)

This may mean that the decision-maker is not the person who knows the individual best. Determining who the decision-maker is depends on the decision and the context, and not on the circumstances of the individual

If someone lacks capacity to make a decision for themselves any professional will need to involve family, friends, supporters, and an Independent Mental Capacity Advocate if appropriate, in the decision. The professional needs to have a genuinely open mind about the outcome of a decision. It may be appropriate to have a Best Interests Meeting to explore any differences (Part 9: Best Interests Meetings) (Part 11: Resolving disputes)

A public authority (local authority or health care trust) may have to make a decision which goes against a family view. The public authority must be able to show that any care they deliver is better for the person than the care the family want.

Involving other people

Many decisions will be multi-disciplinary in practice, but the decision-maker will be the person ultimately responsible for making and recording the decision.

A decision-maker must seek information from other people. For instance, a social worker making a decision about someone's capacity to decide about their care needs on discharge from hospital will seek information from family and friends, an IMCA (if appointed), ward staff, people who cared for the person in the community and anyone with knowledge of the person.

Any decision-maker can seek advice from anyone else. It may be appropriate to consult a psychiatrist or psychologist, speech and language therapist or other specialist.

Anyone making an assessment should seek information about how the person is best able to communicate and how their understanding can best be enhanced. Family and friends are likely to be able to give this information.

If there is no one who can be consulted about the decision who is not paid to provide care, and no family or friends, the person is described as 'unbefriended'. For significant decisions, defined as a change in accommodation, serious medical treatment or an extended stay in hospital or residential care the person should be referred for a report from an Independent Mental Capacity Advocate (IMCA). The IMCA will provide a report about the person's situation and views: they will not make the decision and the decision-maker retains their responsibility. (Part 15: Independent Mental Capacity Advocates)

Part 8 Best interests decisions -

[MCA section 4; Code of Practice chapter 5]

If a decision-maker determines that someone lacks capacity to make a specific decision, the decision-maker must then go on to make that decision – this is called a best interests decision. A best interests decision can only be made after it has been determined that the person lacks capacity.

Principle 4 requires that all decisions are made in the best interests of the person who lacks capacity. The focus must be on this person and their best interests and not that of others, such as family, other patients or residents, or the general public.

Making a best interests decision

The Mental Capacity Act (MCA) can't lay out a process for making decisions, as the scope for decision making is so wide. It does lay out what needs to be taken into consideration in a best interest checklist.

The best interests checklist

1. The decision must not be made on the basis of the person's age or appearance.
2. The person's behaviour should not lead to assumptions about what might be in their best interests.
3. All relevant circumstances need to be considered.
4. Is the person likely to regain capacity? Can the decision wait?
5. Involve the person in the decision-making as much as possible. Even though they lack capacity to make this decision, their views need to be considered and the process needs to include them as far as possible.
6. If the decision concerns life-sustaining treatment, the decision must not be based on a desire to bring about death – the MCA can't be used for the purposes of euthanasia.
7. The decision-maker must consider the person's past and present wishes, beliefs and values which would influence their decision-making if they had capacity, and other factors they would take into consideration if making their own decision.
8. The decision-maker must take into account the views of anyone caring for the person or interested in their welfare – this includes paid and informal carers. If possible, the decision-maker must consult anyone who has a Lasting Power of Attorney or is a deputy appointed by the Court of Protection.

Using the best interests checklist

- The decision-maker is responsible for the decision.
- The decision-maker must consult and involve others as much as possible. Consultation should ensure that the decision is not restricting the rights of the person lacking capacity.
- If the person has no family or friends who can be consulted about a decision they are considered to be 'unbefriended'. If someone lacks capacity to make a significant decision (a change of accommodation or serious medical treatment) and is unbefriended an Independent Mental Capacity Advocate (IMCA) must be used to provide a report about the person's situation and views. (Part 15: Independent Mental Capacity Advocates)
- The decision-maker does not have to follow the views of anyone else, but would need good, reasoned arguments for ignoring the views of others.
- The decision-maker should not avoid discussion with people who may disagree with them. Involving people who might disagree with the decision can often reassure them about the process and allow them to accept the final decision.
- There is no prescribed method of consultation. The decision-maker could see family members with the person being assessed if appropriate – but this may not be helpful.
- There is no hierarchy of whose views should carry more weight. The concept of next of kin does not mean anything under MCA.
- A best interests decision must be based on a holistic understanding of the individual within the context of their life, views and wishes. What would be clinically indicated might not be in the person's best interests when their past views or possible effects of the treatment are considered. For instance someone's care needs may be better met by moving to a different care home, but the stress of a move or the distance from family contact need to be considered.
- Under the Deprivation of Liberty Safeguards (DoLS) there is a specialist role for experienced staff who have extra training to become a best interests assessor. This role only relates to decisions taken under DoLS and doesn't apply to best interests decisions made under MCA.
- Decisions still sometimes need to be made in an emergency, when the full best interests process can't be used. (Part 29: Emergencies)

Formalising a best interests decision

A best interests decision can be made and recorded by the decision-maker. (Part 10: How to record decisions)

It's often not necessary to hold a Best Interests Meeting to formalise the decision making, but it is always necessary to record the best interests decision.

If you are using the MCA capacity assessment form the best interests decision is recorded on this form. It can also be recorded in a care plan or in notes.

The decision-maker's role

The MCA gives the power to make a decision to the decision-maker. (Part 7: Being a decision-maker)

Families often assume that they can make decisions and may be upset and angry if their views are not followed. It's important to make sure people understand how and why decisions are made. The decision-maker may need to explain the law and their role to any family or friends. (Part 24: MCA and family and informal carers)

A decision made by Devon or Torbay councils, an NHS unit or practitioner, or a private provider may not be what family or friends would choose. The organisation needs to be able to demonstrate that it is offering better care for the person who lacks capacity than the care the family are proposing. Every effort will need to be made to resolve disputes about decisions. If it can't be resolved the decision will need to be considered by the Court of Protection and a welfare determination made under s16 Mental Capacity Act.

If professionals disagree about a decision, the decision-maker makes the final decision. There will need to be appropriate discussion of the issues and a clear record of why the decision is made. A best interests meeting should take place and the procedures for resolving disputes should be followed; ultimately the decision could be made in the Court of Protection. (Part 11: Resolving disputes) (Part 8: Best interests decisions) (Part 23: The Court of Protection)

https://new.devon.gov.uk/care-and-health/

Part 9 Best interest meetings -

Some decisions are controversial or complex so it is appropriate to hold a best interests meeting.

Best interests meetings can be formal or part of a multi-disciplinary meeting, for instance within a ward round. The decision-maker will need to consider what sort of meeting is appropriate and what sort of involvement and support is necessary for making and recording each particular decision.

A formal meeting will need to be chaired by someone other than the decision-maker. In Devon, this may be a Team Manager, or Senior Social Worker or Occupational Therapist. The Best Interest Meeting agenda outlines the issues that will be discussed in the meeting.

View the The Best Interest Meeting agenda

If a best interests meeting does not successfully resolve the issues, seek advice to discuss options. Your Team Manager may be the first point of contact in this.

Formal meetings to make complex decisions

A best interests meeting should include information from relevant professionals, family members and the person who lacks capacity. If these people don't attend the meeting their views must be represented. This is a requirement in the best interests checklist. (s4 MCA) (Part 8: Best interests decisions)

- The decision-maker will need to convene the meeting, including arranging who will chair the meeting. There should be a formal record of the meeting and the decision made.
- A best interests meeting may be included as part of a multi-disciplinary team meeting, but it must be clear when the meeting becomes a best interests meeting, how it is organised and who should attend.
- Where the person does not have someone who can advocate on their behalf, an advocacy service should be engaged to support them through Devon Advocacy Consortium.   Where the issue being considered is a deprivation of liberty, the Independent Mental Capacity Advocates (IMCAs) should be contacted.
- If a decision is being disputed you must seek advice.

Before the meeting the chair should liaise with the decision-maker to:

- check there is an appropriate and valid capacity assessment
- clarify exactly what the decision is
- clarify what information is necessary to make the decision
- plan the detail of the meeting, including where it will be held, when it should happen, who should attend, who will represent the views of those who can't attend and who will take minutes
- organise any support needed by the person the decision is being made for, this may be support to understand the purpose of the meeting or to express their views
- organise any support needed by friends and family of the person
- prepare an agenda.

The agenda should cover:

- introductions
- a statement about the confidentiality of the meeting and any related documents
- the purpose of the meeting – what decision is being made?
- confirmation of the decision-specific capacity assessment
- a review of the Best Interests Checklist to make sure everyone is clear about their statutory responsibilities under MCA (MCA section 4) (Part 8: Best Interests Decisions)
- information from relevant parties. What does the person who lacks capacity want? What is known about their previous wishes, their values and beliefs? This includes the view of anyone named as to be consulted such as someone with Lasting Power of Attorney, Enduring Power of Attorney or a deputy. Also include views from an Independent Mental Capacity Advocate (IMCA) or other advocate, views from family, friends or supporters and the views of professionals (MCA section 4)
- discussion – the chair will need to make sure that everyone can participate
- a summary from the chair, including a risk assessment.
- the decision that the meeting believes is in the person's best interests – the decision-maker is still responsible for making the decision and they are not obligated to follow the decision of the meeting, but will need a clear reason if they do not.
- the action plan – the meeting may ask for further assessments or reports and then reconvene. There may need to be interim decisions made about the person's safety or care. Other actions or decisions may become clear during the meeting
- making decisions about how to proceed if the meeting cannot agree.

After the meeting the chair should:

- make sure an accurate record of the meeting is prepared

- make sure this record is distributed to everyone who attends or who gave apologies
- make sure any agreed actions are completed.

The authority of a decision-maker (MCA s4(9))

The MCA gives the power to make a decision to the decision-maker. (Part 7: Being a decision-maker)

Families often assume they can make decisions and may be upset and angry if their views are not followed. It is important to make sure people understand how and why decisions are made. It may be the role of the decision-maker to explain the law and their role to any family or friends. (Part 24: MCA and family and informal carers)

If professionals disagree about a decision, the decision-maker makes the final decision. There would need to be appropriate discussion of the issues and a clear record made of reasons why the decision is made.

If a best interests decision is disputed

The process for resolving disputes should be followed and ultimately the decision could be made in the Court of Protection. (Part 11: Resolving disputes) (Part 23: The Court of Protection)

It may be appropriate to consider referral for independent mediation. Seek advice from your Team Manager, the local MCA Lead or, if there is a risk of abuse or neglect, from the Safeguarding team.

The Court of Protection is a branch of the High Court, set up to protect people who lack capacity and it can make determinations concerning any decision. Referral to the Court of Protection should be a last resort. (Part 23: The Court of Protection)

If legal action may be necessary speak to your team manager, and with their agreement seek legal advice.

Make sure the priority remains the welfare and safety of the person whose best interests are being considered. Consider if their circumstances mean a referral should be made to the Safeguarding Adults process.

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Part 10 How to record decisions -

It is a legal requirement that evidence of assessments and best interest decisions is recorded. This can be in a care plan, a daily record or on the Mental Capacity Act (MCA) capacity assessment form. There is no legal requirement to use any particular form or paperwork to record decisions

A decision-maker must always use the two step method of decision-specific assessment of capacity. (Part 6: How to assess capacity)

The person arranging care needs to know if someone has capacity to make the decision about this care, and to make this clear in any documentation. Every care plan concerning a person who may lack capacity must include details of how their capacity has been assessed, whether they lack capacity and, if they do, what the best interests decision is.

Recording a decision on an MCA capacity assessment form

You can record a capacity assessment and a best interests decision on an MCA Capacity Assessment form, which is available on all local electronic recording systems. You can print off a paper copy if you don't use an electronic recording system.

This form gives clear evidence of how a decision has been reached, and should be used to record any decision that is complex, controversial or life-changing. If someone is assessed as having capacity it is important that this is clearly recorded; Particularly if the person may make an unwise decision, or if they are at risk of losing capacity in the future.

Staff can also use the form as a prompt if they feel unsure of the two step process.

It isn't necessary to complete a form for every decision and would often be inappropriate.

Recording a decision in a care plan

There must be evidence in a care plan that someone's capacity to make a particular decision has been assessed and what the best interests decision is.

This be recorded in a care plan as:

> Mrs X lacks capacity to decide if she should receive help with her personal care at

this time. This is determined under MCA because her memory problems mean she isn't able to understand that she can't manage these tasks herself and can't weigh up the risks she faces if she doesn't have this help. There is a high risk to Mrs X's wellbeing if she doesn't receive this help. I have consulted Mrs X's daughter and concluded that it's in her best interests to receive help with her personal care. Care assistants should encourage and support Mrs X to accept help.

This statement lays out the specific decision, details the diagnostic test and two of the four questions in the functional test, details the best interests decision and gives instructions to the carers to proceed.

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Part 11 Resolving disputes -

[Code of Practice chapter 15]

There is no formal appeals process under MCA. The MCA provides open, accessible decision-making and everyone who uses MCA must be open to challenge. At times this can result in disputes.

The decision-maker:

- has the authority to make a decision about someone's capacity and their best interests
- must follow the two step process to assess capacity
- must follow the best interests checklist to decide on someone's best interests – this includes consulting other people such as professionals, family and friends and an IMCA if appropriate.

If the decision-maker follows the correct steps they have the authority to make the decision. (Part 6: How to assess capacity) (Part 7: Being a decision-maker) (Part 8: Best interests decisions)

Other professionals may disagree with a decision-maker's conclusion. It will be appropriate to discuss this openly, perhaps in a best interests meeting, to try to resolve any dispute, but the decision-maker has the final authority to make the decision. Other professionals don't have to agree with the decision-maker's conclusions, but they do need to understand and abide by the decision. (Part 9: Best interests meetings)

Family, friends or an IMCA may disagree with professional decisions, or there may be disputes in someone's circle of family and friends. It's best to try and solve disputes through communication. Involving people in the decision-making process may reassure them that their views are heard and that a proper legal process is being followed. A best interests meeting may offer a more formal way of involving family or friends in a decision and enable them to accept the decision. (Part 9: Best interests meetings)

If the decision-maker represents an organisation providing care – such as DCC or Torbay Council, the NHS or a private provider – they need to demonstrate that the care provided by the organisation is better for the person than anything proposed by their family.

It may be possible to use mediation to enable people to consider a difficult decision. Contact the Family Mediation Helpline or the National Mediation Helpline or other local

services. (Contact details)

Making a complaint

Anyone can make a formal complaint about any services received. Anyone who may lack capacity, or their family or friends, should be offered whatever support they need to make a formal complaint. (Contact details)

Court of Protection

If it is not possible to resolve a dispute, the Court of Protection can make a decision. A public authority should seek a Court determination if there is sustained dispute about a decision, although anyone can apply to the Court of Protection. Application to the Court of Protection should be a last resort. Make sure that you have sought the advice of the local Safeguarding Adults Team or MCA Lead and have legal advice. (Contact details) (Part 23: The Court of Protection)

Part 12 Legal protection when applying MCA -

[Code of Practice Chapter 6]

Remember!
If personal care is given to someone who has not consented to it, it is assault. If a professional enters the house of someone who has not consented to them coming in, it is trespass. If someone who has not consented is taken to hospital, it is kidnap.

Under MCA protection from prosecution is given to anyone who performs these acts if:

1. the person's capacity for the relevant decision has been assessed
2. they lack capacity
3. it is in their best interests to perform the act
4. there is no Advance Decision against the act. (Part 17: Advance Decisions and Advance Statements)

This means that if someone's capacity and best interests have not been assessed there is no legal protection. If the decision-making is not recorded there is no means of evidencing that the decisions were properly reached if the decision is challenged.

This is the legal sanction of MCA: if decisions have not been reached in the correct way there is no legal protection available.

Some professionals may talk about a 'section 5 act'. This means a decision which can be taken under MCA; a decision which does not need the extra processes of the Mental Health Act, Deprivation of Liberty Safeguards or a determination from the Court of Protection. Performing a section 5 act simply means putting into action the best interests decision.

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Part 13 If the person can't comply with the decision -

[Code of Practice chapter 6]

No matter how carefully assessments are undertaken and recorded, sometimes the person does not do what has been decided, so what can you do?

Remember the fifth Principle: ‘Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.’ (MCA section 1) Following this, you will have decided on whatever most closely accords with the person’s wishes and you will have considered any alternatives. So what has been decided is what must happen.

You can’t abandon the best interests decision because the person doesn’t agree, so you will need to encourage and persuade them.

Instead of asking the person if they would like to do it, tell them that it is going to happen. For many people that slight change in tone may be enough for them to be able to comply.

If the person is still not able to comply it may be appropriate to use restraint. (Part 14: Restraint)

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Part 14 Restraint -

[MCA section 6; Code of Practice 6.40 6.48]

The MCA allows the use of restraint – 'the use or threat of force' – if:

- staff 'reasonably believe' it is necessary to use this restraint to prevent harm to the person (not to others)
  and
- it is a proportionate response to the likelihood or seriousness of that harm.

No restraint is allowed under MCA section 5 that would deprive someone of their liberty. Examples of restraint could be a locked door, taking someone's arm to lead them away, distracting someone from what they wanted to do or a one off use of sedation.

It might be a proportionate response to give someone a sedating injection to enable them to co-operate with an x-ray, but not proportionate to sedate them daily to stop them shouting out. It might be proportionate to lead someone firmly to the car to take them into residential care, but not to do it regularly to take them to a day centre.

Limits of the use of restraint

Follow Principle 4: 'An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done or made, in his best interest'. This means that any restraint can only be authorised if it addresses risks posed to the person who lacks capacity. If someone's behaviour is posing risks to other people, MCA will not allow use of restraint. It may be necessary to consider use of the Mental Health Act or criminal justice procedures. Local restraint policies must be followed.

Restraint is also the term used to describe use of chemical, mechanical or physical means of controlling someone for a significant period of time. This is a more serious matter than the examples above.

Section 6 allows for the restriction of someone's movement under MCA. It does not allow for depriving someone of their liberty. (Part 32: Deprivation of Liberty Safeguards) So restraint using physical force, using seclusion, mechanical restraints or the forcible use of sedating medication would not be authorised under MCA s6 as these may amount to depriving someone of their liberty.

There are serious risks involved in using restraint which might involve physical force, chemical restraint or any sort of control measure. If such measures are needed they can

only be used by suitably trained staff, who must follow the correct restraint policy and procedures for their employer.

Patients on a mental health unit who need to be restrained may need to be considered under the Mental Health Act.

If you are unsure if someone is being deprived of their liberty discuss this with the local MCA or Deprivation of Liberty Safeguards Lead. (Part 32: Deprivation of Liberty Safeguards)

Part 15 Independent Mental Capacity Advocates -

[MCA section 35; Code of Practice chapter 10]

The Devon and Torbay Independent Mental Capacity Advocates (IMCA) service has a specific role prescribed by the Mental Capacity Act. It works on behalf of people who:

- lack capacity to make a particular decision
- have no family or friends and so no-one unpaid who can be consulted. People in this situation are described as ‘unbefriended’.

Under safeguarding, this second criteria might be used more flexibly, where it is considered to be in the best interests of the person.

There is a statutory responsibility to instruct an IMCA where the person meets the criteria and a decision needs to be made:

- about a proposed change of accommodation – where Devon or Torbay is proposing to provide accommodation for someone for more than 8 weeks (MCA section 38). This applies if the local authority is making the arrangements or contracting for the accommodation
- if the person is admitted to an NHS facility for more than 28 days (MCA section 39)
- about proposed serious medical treatment. Where a serious medical treatment decision is being considered for a person who is eligible, the Act imposes a duty on the NHS body to instruct an IMCA.

An IMCA could also be instructed:

- when local authorities or NHS bodies ‘propose to take or have taken, protective measures in relation to a person who lacks capacity to agree to one or more of the measures and
where safeguarding adults proceedings have been instigated. The primary focus for IMCAs in safeguarding adults proceedings are the decisions concerning protective measures (including decisions not to take protective measures)’.
- at a Care Plan review.

The IMCA also has a number of specific functions within the Deprivation of Liberty Safeguards process. Where the person is un-befriended the supervisory body must instruct an IMCA. (SCIE Guidance)

The IMCA role

The IMCA will:

- meet with the person – the IMCA has a right to see the person alone in private. It is essential that the individual is placed at the centre of any process that involves decisions about them, so the IMCA will build a picture of that individual, their views, values and wishes.
- talk to anyone who may have information and examine any relevant records – the Mental Capacity Act gives the IMCA the right to see all relevant health and social and care records (MCA section 35)
- find out what alternative options there are – the IMCA will ask whether the proposed option is less restrictive of the person's rights or future choices
- produce a report to support the decision-making process – this should be evidence-based reflecting the persons views and wishes. The report may also comment on possible alternative courses of action. Ultimately it is the decision-maker who must make the decision in the person's best interests, but they must take account of the report and information given by the IMCA
- support the person through the decision-making process.

Working with an IMCA

The decision-maker should keep the IMCA informed about the best interests process and about the decision when it's made.

Once an IMCA is instructed they remain so until 'de-instructed' by the decision-maker, except in the safeguarding process, so it's essential that the decision-maker is aware of the IMCA's role and contribution.

The IMCA service will work in the bounds of confidentiality and the Data Protection Act at all times. The IMCA report is prepared for the decision-maker and should not be made available to others without their agreement, or as part of a best interests decision.

There is no statutory requirement for the IMCA service to have access to a copy of a mental capacity assessment before acting on the instruction; but all information given to the IMCA will help the process and guide the IMCA.

Before making an instruction for an IMCA in safeguarding adults, it is necessary to assess the person as lacking capacity for at least one protective measure which is either being considered, or has been put in place.

To make a referral phone **0845 2311900** or email imca.devon@nhs.net
You can also download a referral form
The IMCA service will respond to all referrals within 48 hours.

Part 16 Serious medical treatment -

[Code of Practice 10.42–10.50]

If someone is unbefriended and lacks capacity to make a decision about serious medical treatment they must be referred for Independent Mental Capacity Advocate representation and an evidence-based report. A referral should be made as early as possible on the care pathway. (Code of Practice 10.42) (Part 15: Independent Mental Capacity Advocates)

Serious medical treatment is defined as:

> the starting, stopping or withholding of treatment when the choice of treatment is finely balanced, where the likely benefits and burdens of the treatment are finely balanced, or where there are likely to be serious consequences for the person. (Code of Practice 10.43)

Serious consequences includes the effects of the treatment, such as prolonged pain or distress and the consequences of the decision such as stopping life sustaining treatment. It also includes treatment which has an impact on the person's future life choices, such as treatment which might affect fertility. (Code of Practice 10.44)

The Code of Practice sets out examples of medical treatment which might be considered serious.

- Chemotherapy and surgery for cancer
- Electro-convulsive therapy
- Therapeutic sterilisation
- Major surgery – such as open-heart surgery or brain/neuro-surgery
- Major amputations – for example, loss of an arm or leg
- Treatments which will result in permanent loss of hearing or sight
- Withholding or stopping artificial nutrition and hydration
- Termination of pregnancy

(Code of Practice 10.45)

The code is also clear in stating that these are only examples of treatments that would be considered serious in any situation.

A relatively simple procedure for one person, such as a hernia repair under a general anaesthetic, could be considered as high risk for another if there is only sparse health

history and other co-morbidities such as heart failure or obesity. In this case you may want to consider this treatment for this individual as serious.

Older people or people who have disabilities may be more vulnerable and less able to withstand some medical interventions. Some medical treatment may be regarded as serious for those individuals.

If a clinician is not clear if a proposed treatment should be considered as serious, the situation can be discussed with colleagues.

All decisions about medical treatment need to follow the best interest process. (Part 8: Best interests decisions)

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Part 17 Advance Decisions and Advance Statements -

[MCA section 24; Code of Practice chapter 9]

An Advance Decision:

- is a legally binding statement refusing medical treatment
- can only be made by someone who is at least 18 years old and has the capacity to make that decision
- can only be made about medical treatment and not about personal care, nursing care or any other decisions
- can’t be made requiring or agreeing to a certain form of treatment: it can only refuse treatment.
- must be valid and applicable – valid means the person must have capacity at the point at which they make the decision; there must be no evidence of a change of mind and there must be no Lasting Power of Attorney or deputy with the power to make the decision. (Part 19: Lasting Powers of Attorney) If there is any doubt about the person’s capacity to make this decision it is good practice for a capacity assessment indicating their capacity to be recorded at the same time as they make their Advance Decision. Applicable means the decision must relate to the specific situation in which the treatment is being offered. It is possible for medical staff to disregard an Advance Decision if it is felt that progress in medical treatment means the Advance Decision is not relevant, or if the exact circumstances are not as stated.
- can be expressed in lay terms and does not have to be in writing. However, it is sensible for it to be fully recorded and for a copy to be placed on medical or care notes and anywhere else where it may be seen
- can only be acted on if the clinician has seen it – other staff may have a role in advocating for the person and making sure a doctor sees any relevant Advance Decision
- can be overridden if the person needs to be detained under the Mental Health Act.

An Advance Decision refusing electro-convulsive therapy cannot be overridden even if the person is detained under the Mental Health Act. The person can only be given such treatment in an emergency, to save their life. (MHA section 58a) (Part 31: The Mental Capacity Act and the Mental Health Act)

Life sustaining treatment

An Advance Decision can be made to indicate someone’s wish not to receive life sustaining treatment, such as resuscitation or mechanical ventilation.

If the Advance Decision relates to life sustaining treatment then the Decision must be in writing, signed and witnessed.

It is wise to make sure that such a Decision is copied into all medical or care notes and that the person carries a copy of it with them. Everyone who may be asked about such a Decision should be fully aware of it, what it says and where it is. It is wise to discuss it with all practitioners.

Do Not Attempt Resuscitation orders (DNAR)

These orders relate to a decision made in advance as to whether someone should be resuscitated in the event of a cardiac arrest.

If someone has capacity to make this decision they should make it for themselves and their wishes must be respected. If there may be doubts about their capacity it may be wise to record that they have capacity to make this decision. (Part 6: How to assess capacity) (Part 10: How to record decisions)

If someone doesn't have capacity to make a DNAR a best interests decision can be made. This is serious medical treatment and a full assessment is needed before decisions are made. There needs to be an assessment of the person's capacity to make the decision and a record of how the best interests decision has been reached. This will include speaking to the person's family, but the family do not make the decision. If the person is unbefriended there will need to be a referral for Independent Mental Capacity Advocate representation and an evidence-based report before the decision is made. The decision-maker will be the doctor providing medical care. (Part 15: Independent Mental Capacity Advocates) (Part 6: How to assess capacity) (Part 7: Being a decision-maker) (Part 8: Best interests decisions)

If someone is in hospital the consultant will be the decision-maker and will lead the process. If someone is in the community the decision-maker will be their GP or the Palliative Care Team. Family members are never the decision-makers for this decision and should never be asked to make this decision.

It is important that any DNAR includes clear direction for any carers as to what to do in the event of someone collapsing. It is helpful to include directions for paramedic crews.

All decisions about such emergency care will need to be regularly reviewed.

If someone has previously been able to make their own decision but has now lost capacity their views should be taken into account. However a best interests decision will

need to be made and this may not be the same as the person's previous decision.

Advance Statements

An Advance Statement can be made about any aspect of care or accommodation or lifestyle.

These statements would be considered as evidence of the person's wishes when a best interests decision is being made, however an Advance Statement is not legally binding. For instance; it would be possible for someone to make an Advance Statement saying that they don't want to go into residential care; if they later lose capacity and admission to care becomes an option, the Advance Statement would be taken into consideration but the refusal would not be legally binding. A best interests decision would be made after consideration of all the current relevant circumstances.

It is possible to use an Advance Statement to indicate what care or treatment someone would like to receive. People who have a relapsing problem with their mental health may know when they are well that a particular form of treatment is helpful, but may lose capacity to make that decision when they are unwell. It is possible to make an Advance Statement indicating choices about treatment; however, the decision about treatment would be made by the decision-maker at that time, who would pay due regard to any Advance Statements. (Part 8: Best interests decisions)

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Part 18 End of life care and decision-making -

It is wise for everyone to make sure people around them know what sort of care they would like at the end of their lives. However people's needs change and capacity can change as people become weak and frail.

It is sensible for everyone who has capacity to do so to make Advance Statements about medical care they wish to refuse. (Part 17: Advance Decisions and Advance Statements)

Do Not Attempt Resuscitation orders (DNARs)

These orders relate to a decision made in advance as to whether someone should be resuscitated in the event of a cardiac arrest.

If someone has capacity to make this decision they should make it for themselves and their wishes must be respected. If there may be doubts about their capacity it may be wise to record that they have capacity to make this decision. (Part 17: Advance Decisions and Advance Statements)

Treatment Escalation Plans (TEPS)

- A TEP is a clinical document giving guidance to health care professionals about which treatments an individual should or shouldn't be given. It is designed to simplify decision-making when people have complex needs and is often used when people are approaching the end of life.
- A TEP form should be completed together with an indication of the person's capacity to make decisions about their medical care.
- A TEP is completed by a doctor and gives guidance as to whether the person should or shouldn't be given different types of treatment. Separate guidance will be given about separate types of treatment. A TEP form may say that someone should not be given any particular type of treatment.
- A TEP form is completed in consultation with the person and their family, as far as is possible and appropriate.
- The decisions about treatment made on a TEP form are made by the doctor and not by family.
- A TEP form should travel with the patient wherever they go.
- Social care professionals should immediately make a TEP form available to a healthcare professional who attends to administer treatment to the patient.
- A TEP form needs to be regularly reviewed and updated in response to any change in the person's condition, any change in their views or that of their family or any views of people caring for the person.

- In the event of a medical emergency where the evidence (of Advance Decisions or a TEP form) is not clear, someone should be given first aid and contact made with emergency services. If the documentation is not clear, medical treatment will be given.
- Anyone caring for or supporting someone who is near the end of their life should ensure that all documentation is clear and readily accessible to all staff and medics. Everyone should advocate for the individual and what is known about their wishes.

Part 19 Lasting Powers of Attorney -

MCA sections 9-14; Code of Practice chapter 7;

Anyone over the age of 18 who has capacity to make the decision can donate a Lasting Power of Attorney (LPA). This gives someone else the power to make decisions as if they are the person. An LPA needs to be formally registered with The Office of the Public Guardian. (Part 6: How to assess capacity)

There are two types of LPA.

- A Property and Affairs LPA makes decisions about the person's finances.
- A Personal Welfare LPA makes decisions about medical and social care.
- The same person may be given both forms of LPA. There is a parallel process for donating each type of LPA.

The donor (the person giving the LPA) can limit the scope of the decisions to be made.

Before MCA came into effect there was Enduring Power of Attorney which only related to financial decisions. All EPAs donated before 30 September 2007 are still valid, but no new EPAs can be donated.

All staff must ask if someone has a LPA or EPA before making any decision. Some standard documents includes a prompt to ask this, but not all. Always make sure this is properly recorded. Many people who hold some form of Power of Attorney are confused about the limits of their powers and what they can decide. No decision should be based on what a LPA or EPA says without seeing documentation of their power.

A Property and Affairs LPA can make decisions and take action for the person even if the person has capacity. The LPA needs to ensure either that they are working with the person's agreement or that the person lacks capacity for that particular decision. A Welfare LPA can only make decisions if the person lacks capacity to make that particular decision.

An LPA makes decisions as if they are the person and must act in the person's best interests. If there are concerns that an LPA is not acting in a person's best interests this needs to be discussed with them by the professionals involved. If the matter can't be resolved it may be appropriate to refer the case to the Safeguarding Adults process. The Public Guardian's Office can also monitor LPAs.

Emergency treatment should always be given. (Part 29: Emergencies)

If there is dispute about the treatment, or if the LPA documentation is not available, treatment to sustain life will normally be given. An urgent application for a Court of Protection determination under s16 MCA could be made to dispute a LPA's decision. If this happens seek urgent advice from your legal team. (Part 23: The Court of Protection)

It is possible to confirm if someone holds a valid LPA or EPA by consulting the Office of the Public Guardian. This may take up to five days.

All documentation, forms and advice about LPAs can be found on the Public Guardian website or phone the helpline on **0845 330 2900**

https://new.devon.gov.uk/care-and-health/

Part 20 Conveying someone to hospital or residential care -

Deprivation of Liberty Safeguards Code of Practice 2.14 and 2.15

If a best interests decision has been made that someone should be admitted to hospital or residential care it's usually possible to move someone using an MCA best interests decision because it is in their best interests to be moved.

A separate capacity and best interests decision needs to be made to cover conveying the person from one place to the next. This will need to be completed by the person who has made the best interests decision about the admission. (Part 6: How to assess capacity) (Part 8: Best interests decisions)

A best interests decision will give legal cover to anyone moving a person who lacks capacity. (Part 12: Legal protection when applying MCA)

Many people will be able to comply with the decision that they should get into a car or ambulance. Do everything you can to support them and explain why, arrange for a family member or friend to accompany them and make sure that they have significant belongings with them. It may help to be clear that they must go, rather than asking if they want to go. It may be necessary to take the person's arm to lead them to the car or ambulance to persuade them to go. This may amount to restraint which is acceptable under MCA section 6. (Part 14: Restraint)

The Deprivation of Liberty Safeguards Code of Practice (2.14) is clear that transporting someone into hospital or a care home will not usually be considered a deprivation of their liberty, even if it is expected that the person will be deprived of their liberty once they are in the hospital or care home.

If someone can't be conveyed under a best interests decision process, consider if a Guardianship Order would be appropriate. A Guardianship Order (MHA section 7) gives authority to convey someone to the place it has been decided they need to live and can give ambulance crew the necessary authority to take someone against their wishes. A Guardianship Order will usually only be issued if it will be needed to support the person to remain in the home once they have moved. To explore this possibility contact your local Approved Mental Health Practitioner service. (Contact details)

Applying for a Guardianship Order is a lengthy and complex piece of work.

If the person can't be supported and persuaded to comply with the decision to convey them and Guardianship is not appropriate, to force them against their wishes to travel

elsewhere could amount to a deprivation of their liberty. Nothing in the act allows for a person to be deprived of their liberty (MCA section 4A) unless this is sanctioned by order of the Court of Protection or authorised using the Deprivation of Liberty Safeguards. As the Deprivation of Liberty Safeguards do not apply outside of registered care setting, it may be necessary to urgently apply to the Court. The Court of Protection can then make a decision that the person should be transported even if this deprives them of their liberty (DoLS Code of Practice 2.15) (Part 23: The Court of Protection)

There is a local protocol for the use of ambulance transport under MCA which explains the responsibility of the decision-maker to record someone's capacity to decide about the conveyance, the need to plan the move and to give information to the ambulance service. Remember that ambulance crews also use MCA all the time and may make their own assessment of someone's capacity. The protocol includes a form designed to give authorisation for ambulance crews to convey someone in their best interests.

In an emergency, decisions will be made by relevant people. Ambulance crew, for instance, will convey someone who is not able to consent to going to hospital by making a swift judgement about their capacity or using the common law doctrine of necessities. (Part 29: Emergencies)

If there is an emergency situation and someone is at serious risk call for police or ambulance support immediately.

Ambulance crews are only protected against the possibility of depriving someone of their liberty if the situation is a genuine emergency which requires the giving of life sustaining treatment or of a vital act to be carried out to stop a serious deterioration in the patient's condition (MCA section 4B). This means they are unlikely to be able to assist in the removal and transportation of someone with a chronic long-term condition who is resisting a request to go in to hospital or a care home.

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Part 21 Consent to having sex -

Sexual behaviour can be tricky for workers and families to deal with: it can be hard to separate moral judgements about what people should do from their ability to decide what they want to do and then hard to separate their capacity to consent from what they actually consent to.

The law is clear – someone's capacity to make the decision to engage in sexual behaviour needs to be assessed separately from any other assessments of their capacity.

There may need to be separate assessments for different types of sexual behaviour. Examples of sexual behaviour could include sexual intercourse (penetrative or not; heterosexual or homosexual); mutual masturbation, being filmed or photographed while engaging in sexual behaviour, viewing pornography, kissing, cuddling or fondling in a sexual way. This list is not exhaustive.

No best interests decision can be made about having sex – we can't decide that someone should have sex. (MCA Code of Practice 1.10)

It may be appropriate to decide that someone lacks capacity to decide to have sex and then it may be appropriate to stop them from doing so. It may be the role of staff to consider if someone who has capacity to make this decision is actually consenting to the sexual activity in which they are engaging.

We need to be clear whether someone can understand enough to make their own decisions. If they do not have capacity to make this decision they must be stopped from engaging in sexual acts to which they cannot consent.

Recent judgements (D Borough Council v AB [2011] and A Local Authority v H [2012]) indicate how someone's capacity to make this decision should be assessed. The person needs to understand:

- how to have sex – what to do
- the possible consequences in terms of pregnancy
- the risks of sexually transmitted infections.

This is a low level of capacity and many people will meet these criteria; they can then go on to make decisions. Their decisions need to be respected. Making unwise decisions about sex does not indicate a lack of capacity to make the decision

It is then necessary to consider whether the person is consenting to the sexual act in question. For instance if someone is confused and believes they are having sex with their spouse who actually died years ago they would not be able to consent to the present relationship: they are not consenting to have sex with the right person.

Some people may be vulnerable to pressure to consent to sex or to sexual exploitation. All services need to be aware of this risk and to support and protect people as appropriate.

The Court of Protection has been clear that if someone doesn't have capacity it is the duty of service providers to provide them with education and support to try to enable them to gain capacity, if this is appropriate for the individual.

Until someone has gained this capacity they cannot decide to have sex and we need to put in place whatever protections they need. It is the responsibility of the service provider to prevent the person engaging in sexual behaviour. If this is not done, the service is allowing rape or sexual assault. This may mean extra staffing or support in a residential home or hospital to restrict contact between people. There are recent cases where the Deprivation of Liberty Safeguards have been used to prevent someone who doesn't have capacity from having sex to which they cannot consent. This should be explored if appropriate. (Part 32: Deprivation of Liberty Safeguards)

Some sexual behaviour engaged in without any else can pose significant risks, such as auto erotic strangulation. If someone may lack capacity to make the decision to engage in this potentially fatal behaviour their capacity will need to be assessed and it may be necessary to take measures to prevent them from doing this.

Illegal sexual activities, such as bestiality or incest should be dealt with through the police or safeguarding processes: the MCA does not apply.

Devon
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Part 22 The legal position of 16-18 year olds -

Code of Practice chapter 12

The Mental Capacity Act applies to anyone over the age of 16. Decisions about a young person's capacity and best interests can be made in the same way as for any adult.

There are some exceptions to this: only people over 18 can make an Advance Decision or donate a Lasting Power of Attorney. The Deprivation of Liberty Safeguards only apply to people aged 18 or over.

If legal proceedings concerning someone aged 16-17 are being heard in Court, the Court of Protection may refer the decision to the Family Courts, or the Family Courts may refer the decision to the Court of Protection: each decision will be considered individually.

Consent to treatment

Young people over 16 years old are presumed to have capacity to consent to surgical, medical or dental treatment and to associated procedures, such as nursing care. (Family Law Reform Act 1969)

Some procedures, such as organ donation, are not covered by this, but by a test of 'Gillick competence'. This test is used with people under 16 and for people over 16 for procedures which may not be of benefit to the young person themselves. It is similar to the capacity test and assesses if the young person has the intelligence, maturity and understanding to comprehend what is proposed.

The person proposing any treatment or care needs to be clear about the young person's capacity to make the decision. If the young person can't make the decision because of an impairment of or disturbance in the functioning of the mind or brain then the assessment and process of MCA will apply. (Part 6: How to assess capacity) (Part 8: Best interests decisions)

If a young person has capacity to consent to treatment, their decision must be respected. If the young person makes a capacitated decision to refuse treatment this must also be respected – even if someone who has parental responsibility wishes to consent on their behalf. If the young person has capacity, the MCA does not apply and the Court of Protection cannot intervene. The Family Courts can make decisions in such situations.

If a young person does not have capacity to make a decision, the decision could be

made following MCA processes or could be made by the person with parental responsibility. The method by which the decision is made will depend on whether the decision is in the 'zone of parental control' and who is exercising parental responsibility.

Who has parental responsibility?

Someone who has parental responsibility for a young person may be asked to make decisions about their care or treatment if they lack capacity to make the decision for themselves. It is important to be clear who has parental responsibility as it is not necessarily the young person's parent.

- A mother automatically has parental responsibility for her child, unless the child is legally adopted by someone else.
- A father who is married to the mother at the time of the birth, or if the child is jointly adopted, automatically has parental responsibility. If the father and mother subsequently marry, the father can acquire parental responsibility if the birth is re-registered.
- From 1 December 2003 an unmarried father who jointly registers the birth with the mother and is named on the child's birth certificate automatically has parental responsibility.
- An unmarried father who is not on the child's birth certificate, or an unmarried father who is on the birth certificate of a child born before 1 December 2003, can gain parental responsibility by way of a formal parental responsibility agreement between him and the mother or by Court Order.
- Step fathers can acquire parental responsibility if they make an agreement with the mother or by a Court Order.
- If the child is involved in care proceedings, parental responsibility can be assigned to the person they are living with. If the child is subject to a Residence Order the person the child lives with acquires parental responsibility.
- If the child is subject to a Care Order or an Interim Care Order DCC or Torbay Council has parental responsibility.

Parental responsibility lasts until the child is 18. If parents divorce the father retains parental responsibility; the parent the child lives with does not have more powers than the other parent.

What is parental responsibility and the zone of parental control?

Parental responsibility means the: 'rights, duties, powers responsibilities and authority which by law a parent has in relation to a child'. (Children Act 1989)

The zone of parental control is a legal concept describing which decisions a parent should be able to take concerning their child's welfare. There is no codified statement of which decisions come into the zone of parental control.

The Mental Health Act Code of Practice (36.10) give two points that should be borne in mind when considering if a decision comes within the zone

1. Is the decision one that a parent would be expected to make?
2. Are there indications that the parent might not act in the young person's best interests?

You should also consider:

- the nature and invasiveness of what is proposed
- if the young person is resisting
- do the parents' interests conflict with the young person's best interests?

How to make decisions for young people who lack capacity

The general rule is that the person or people who have parental responsibility for the young person should make the decision (Code of Practice 12.16)

If the decision does not come within the zone of parental control it will be necessary to use MCA procedures instead. For instance if the proposed treatment is particularly invasive or controversial, if the young person is resisting or if the interests of the parents conflict with the best interests of the young person.

For instance a young person who usually has capacity may lack capacity when drunk. A decision that they should not go out and engage in more risky behaviour would come within the zone of parental control and a parent, or someone with parental responsibility, should use this to make a decision about the young person going out or not. However, if the young person resists the parent's decision this may move the decision out of the zone of parental control and MCA processes would be indicated. This would be a capacity assessment, best interests decision and using appropriate restraint, proportionate to the risks, if needed. In such a situation decisions would be based on reasonable belief rather than formal assessment. (Part: 24 MCA and family and informal carers)

The decision-maker will need to assess the young person's capacity and best interests. Following the best interests checklist (MCA section 4) the decision-maker will consult people involved in the care and support of the young person which will include, but not

be limited to, people who have parental responsibility. (Part 6: How to assess capacity) (Part 8: Best interests decisions)

If the young person is unbefriended – has no family or friends who could be consulted about the decision – a referral for the support of an Independent Mental Capacity Advocate may be necessary. A referral will need to be made if the decision concerns serious medical treatment or a change of accommodation. (Part 15: Independent Mental Capacity Advocates)

If the decision-maker doesn't agree with the views of the young person's parents or others it will be necessary to follow the same procedure as for any decision – a best interests meeting, use of advocates and mediation as appropriate. (Part 9: Best interests meetings) (Part 11: Resolving disputes)

The Court of Protection can make determinations about a young person's capacity or a best interests decision. This should only be used as a last resort.
(Part 23: The Court of Protection)

If the decision is controversial, make sure you have obtained legal advice and support. Contact your local MCA Lead or Safeguarding Adults Team for advice about MCA; the Child Protection team may also need to be involved. (Contact details)

Devon
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Part 23 The Court of Protection -

MCA; Code of Practice chapter 8

What is the Court of Protection?

The Court of Protection is a superior court of record. It has the same rights, privileges, powers and authority as the High Court. It is able to establish precedent – that means it can establish case law which gives examples of how the law should be put into practice. The Court of Protection has been established to build up expertise in matters relating to capacity.

The Court of Protection follows the statutory Principles of MCA in all its work. (Part 2: The Principles)

Before MCA came into force the Court of Protection dealt only with the financial affairs of people who lacked capacity to manage their own affairs. The new Court also deals with serious decisions about health and welfare.

The Court of Protection is the ultimate decision-maker. If it is not possible to make a decision about someone's best interests, or if someone wishes to object to a decision made under MCA, the Court of Protection can make a decision. The Court of Protection should be the last resort for any such decisions.

If legal proceedings concerning someone aged 16-17 are being heard in Court, the Court of Protection may refer the decision to the Family Courts, or the Family Courts may refer the decision to the Court of Protection: each decision will be considered individually.

Court of Protection declarations

The Court of Protection can make declarations – a court determination about one particular decision.

The Court can make a declaration about someone's capacity. This would be relevant if the person wants to challenge a decision about their capacity, or if professionals or family members can't agree about someone's capacity to make a serious decision. (Part 6: How to assess capacity)

The Court can make a declaration about the lawfulness of a specific act. This will usually refer to a proposed form of serious medical treatment where there is doubt or disagreement over whether the treatment would be in the person's best interests.

Decisions involving the withdrawal of artificial nutrition and hydration from people in a persistent vegetative state, organ or bone marrow donation by the person who lacks capacity, non-therapeutic sterilisation and other situations where there are ethical dilemmas must be referred to the Court. (Part 16: Serious medical treatment)

The Court can make a decision about where someone should live or what care they should receive if other decision-making processes do not apply. If a proposed action will deprive them of their liberty, this can't be agreed under s5 MCA. The Deprivation of Liberty Safeguards do not always apply. The Mental Health Act may apply if the person is suffering from a mental disorder, but someone may lack capacity and not be suffering from a mental disorder, or the MHA may not be relevant. In such cases the only legal way to undertake the act is after a declaration made by the Court of Protection. (Part 31: The Mental Capacity Act and the Mental Health Act) (Part 32: Deprivation of Liberty Safeguards)

The Court can make a declaration where there is dispute about a serious decision – for instance about where someone should live. This might apply if all local attempts to resolve a family dispute had failed. (Part 11: Resolving disputes) The Court will need to make a decision under MCA section 16.

Any local authority, health trust, private provider or practitioner should actively seek Court of Protection decisions if there is a dispute. All members of staff could be asked to prepare or give evidence. Make sure you seek legal advice from your legal team.

Anyone can make an application to the Court of Protection and Legal Aid may be available.

The Court can make a declaration if it is suspected that someone who lacks capacity may be at risk of harm or abuse from a named individual. The Court could make a declaration authorising the local authority to stop contact between the named person and the person who lacks capacity.

A declaration from the Court of Protection should always be the last resort after all other means of making a decision have been exhausted. If you think Court of Protection action may be necessary make sure you have legal advice from the relevant legal team and make sure you have advice from the local Safeguarding Adults Team or MCA Lead. (Contact details)

Court Appointed Deputies

The Court of Protection also appoints and monitors the work of deputies. These are

people appointed to make decisions about someone's property and affairs or welfare.

A Property and Affairs Deputy should be appointed when someone has savings or property, or their financial affairs are complex, and they do not have capacity to manage their own affairs and have not appointed a Lasting Power of Attorney or Enduring Power of Attorney to do this for them. (Part 26: People who lack capacity to manage their money)

Anyone can be appointed as Property and Affairs deputy by the Court. This can be a family member or friend, a solicitor or the local authority. Advice about the appointment of a Property and Affairs deputy is available in Devon from the Court of Protection Team, and in Torbay from the Client Proxy finance Officer. (Contact details)

Welfare deputies are rarely appointed. The Court prefers that each individual decision is made using the best interests procedure. If court action is necessary the preferred route is to make one decision, rather than appoint a deputy. (Part 8: Best interests decisions)

If any statutory agency receives a referral requesting the appointment of a Welfare Deputy, this matter should be passed to the Safeguarding Adults Team or the MCA Lead.

A deputy is appointed by the Court of Protection after a court hearing. It is always necessary to have a medical decision concerning someone's capacity if a deputy is to be appointed.

The Court of Protection and Lasting Powers of Attorney

The Court of Protection is ultimately responsible for the supervision of LPAs and EPAs through the Office of the Public Guardian. EPAs and LPAs must be registered with the Office of the Public Guardian to be valid.

The Court can give directions to an attorney. The Court can cancel the appointment of an attorney if there is evidence that the attorney is not acting in the best interests of the person. The Court might decide then to appoint a deputy to take over the role. (Part 19: Lasting Powers of Attorney)

Part 24 MCA and family and informal carers -

What responsibilities does MCA put on family and friends?

The Mental Capacity Act applies to everyone who is making a decision or caring for someone who may lack capacity to make a decision for themselves. This means that family and friends also need to take notice of the MCA and its Principles. (Part 3: The scope of the MCA)

However, MCA does not expect family and friends to undertake full assessments and record best interests decisions.

MCA s5 describes the person undertaking the act as needing to take reasonable steps to decide if the person has capacity. The person undertaking the act must reasonably believe the act to be in the best interests of the person who lacks capacity.

Anyone, including family and friends, needs to be able to explain how they have made decisions and why they believed it to be in the person's best interests.

Principles of the Mental Capacity Act (MCA section 1)

- **Principle 1** states that everyone should be assumed to have capacity. Family and friends will have a good idea of which decisions someone can make for themselves. It is important not to make too many assumptions and to enable the person to take as big a role in decisions as possible. If there is doubt about whether the person has capacity this should be assessed. If the person lacks capacity, a best interests decision needs to be made.
- **Principle 2** states that every effort should be made to help people to make their own decisions. There may be communication aids, advocates or friends who can help someone to make some decisions for themselves.
- **Principle 3** states that because someone makes an unwise decision, this does not necessarily mean they don't have capacity to make that decision. For instance, all young adults make decisions that their parents feel are unwise: if the young adult may lack capacity it will be particularly important to be clear that they have capacity to make that decision. If they do have capacity then their decision must be respected.
- **Principle 4** MCA states that all decisions and acts must be in the best interests of the person who lacks capacity. This means that decisions must be made about that person and not in the best interests of the whole family.
- **Principle 5** MCA states that decisions taken must be the least restrictive of the person's freedom as possible. The decisions must follow the person's wishes as

closely as possible and give them as much choice as possible.

In addition to the five Principles it is important to remember that MCA requires decision specific assessments of a person's capacity. Someone may not be able to make some decisions, but can make others.

What is reasonable belief?

A good personal knowledge of someone's abilities and communication will usually give family or friends a good reasonable belief about someone's capacity. If there is medical or other professional information available about someone's capacity this should be borne in mind

Always remember that the law expects anyone who makes decisions to be able to describe why they have made that decision ,and what they have taken into consideration in reaching their decision.

When do professionals have to come in?

If professionals are making any decisions about any care or treatment, they will need to make their own assessments of the person's capacity and best interests. (Part 6: How to assess capacity) (Part 7: Being a decision-maker)

A professional making a decision has a legal obligation to consult with people who care for the person who lacks capacity. (Part 8: Best interests decisions)

The professional will be responsible for making the decision, and they may not make the same decision that family or friends would make. (Part 7: Being a decision-maker) Any professional involved must be able to share information about how they have made their decision and how they have applied the law.

If there is disagreement in a family about someone's capacity or best interests it is possible to ask for help in making decisions. (Part 11: Resolving disputes) If family or friends disagree with a decision, consider if the Court of Protection should be asked to make the decision. The organisation needs to show how the care they can provide is better than care the person's family can provide or choose. (Part 23: The Court of Protection)

Mencap has produced an MCA Resource Pack which explains MCA for families

https://new.devon.gov.uk/care-and-health/

Part 25 MCA and untrained workers -

All staff who may work with anyone over the age of 16 who may lack capacity, need to have training in the Mental Capacity Act. All staff need to be aware of the MCA Principles, of how the MCA describes capacity, of decision-specific assessments of capacity and how someone's best interests should be determined. (Part 2: The Principles) (Part 6: How to assess capacity) (Part 8: Best interests decisions)

The MCA does not require particular training or qualification to undertake any of the roles or tasks.

This means that any member of staff could be the decision-maker and may be responsible for making capacity assessments and best interests assessments. If an unqualified member of staff is in a position to be commissioning care, writing care plans or making significant decisions about someone's accommodation or care, they need to follow the guidance about making and recording decisions. (Part 6: How to assess capacity) (Part 8: Best interests decisions) (Part 10: How to record decisions)

Unqualified care or nursing staff are likely to be delivering a lot of hands on care. Someone's capacity to consent to this and their best interests may change frequently and staff need to be aware of this. Unqualified staff would not be expected to undertake a full capacity assessment each time they deliver care. They need to reasonably believe that the person lacks capacity to make a decision about the care and that the care is in their best interests.

Unqualified staff are responsible for passing on information about any changes in someone's capacity to the person responsible for making decisions or writing the care plan. Qualified staff who commission care or write care plans need to include an assessment of the person's capacity and best interests. They need to include some direction for staff who will be delivering the care about what is in the person's best interests.

Part 26 People who lack capacity to manage their money -

Code of Practice chapter 7; 8.31-8.37

People who lack capacity to manage their own money still need to buy goods and services. There is a risk of other people taking advantage of people who lack capacity and also a risk that people are not able to spend their own money on things that they would enjoy.

It is sensible for everyone to nominate someone who can manage their affairs if they lose capacity to do so themselves. If someone is in the early stages of a degenerative disease it is good practice to advise them to donate a Lasting Power of Attorney (Property and Affairs). (Part 19: Lasting Powers of Attorney) If someone does not have capacity to donate LPA then this arrangement can't be made.

The Department of Work and Pensions can appoint someone to act as an appointee; to receive the person's benefits. Policy at DWP about how these decisions are made is changing: sometimes they need evidence of the person's lack of capacity and sometimes a Visiting Officer needs to see the person. If arrangements for receiving someone's benefits need to be made, contact DWP and discuss the situation. There will need to be someone willing to act as appointee.

Direct Debit payments can be arranged to manage things such as utility bills. If the person can make such arrangements with assistance they should sign the necessary forms. If the person can't manage this you will need to speak to the bank about someone else making these arrangements.

If the person who lacks capacity has savings or property, or if their financial situation is complex, it may be appropriate to apply to the Court of Protection to appoint a Property and Affairs Deputy. A Deputy can make all financial decisions for the person, including selling or managing property. A Deputy can be a family member or friend or the local authority. The local authority will only be appointed if there is no-one else or there are valid reasons why a family member should not be appointed as Deputy.

In Devon the Court of Protection Team will consider all referrals to take on this responsibility; there are no set criteria for accepting referrals and you will need to discuss the situation with a team member. In Torbay, contact the Client Proxy Finance Officer. (Contact details)

If it is clearly in the person's best interests (as determined using the best interests checklist MCA section 4) to spend the person's money this will be covered by s5. This

means there is legal protection for the person who spends the money of the person who lacks capacity to make that decision, if it is clear that it is in the best interests of the person that their money should be spent in this way. (Code of Practice 6.58) (Part 8: Best interests decisions) (Part 12: Legal protection when applying MCA)

The Sale of Goods Act 1979 indicates that if someone who lacks capacity enters into a contract and the person providing the goods or services is aware that the person lacks capacity, the contract is not valid.

However, MCA section 7 modifies this. The person providing goods or services can claim a reasonable sum, regardless of the validity of the contract, if the goods or services are necessary. This means that it is appropriate to spend someone's money on the things that they need. The Code of Practice explains that someone 'needs' whatever is appropriate to maintain their previous lifestyle. If someone has never been able to make their own decisions about how they spend their money it would be appropriate to spend their money on things to give them a lifestyle appropriate for an average person of their age, taking into consideration, for instance, the lifestyle choices of their family or friends. (Code of Practice 6.58)

Remember that Principle 4 MCA states that all decisions must be made in the best interests of the person who lacks capacity. This means that decisions about how someone's money is spent cannot be led by the interests of their family. (Part 2: The Principles)

Be aware that people who lack capacity are vulnerable to financial abuse. If there are suspicions that someone is being abused make a referral to the Safeguarding Adults process. (Contact details)

The Money Advice Service offers advice to people who may be losing capacity or who care for someone who lacks capacity to manage their own money.

https://new.devon.gov.uk/care-and-health/

Part 27 People who lack capacity to make legal agreements -

MCA sections 5, 6, 7, 8; Code of Practice chapter 6

Someone who lacks capacity to manage their money will still need to use the services of others. Anyone providing care and support to someone who lacks capacity to manage their own finances needs to be clear how that person's money is managed. (Part 26: People who lack capacity to manage their money)

If someone has a Lasting Power of Attorney (Property and Affairs) or a Court appointed deputy (Property and Affairs) or an Enduring Power of Attorney in place, that person can make decisions about the person's money and sign contracts on their behalf, acting as if they are that person. (Part 19: Lasting Powers of Attorney)

If the person has made a contract before they lost capacity, for instance a tenancy agreement signed before the person developed dementia, the contract will continue.

If someone who lacks capacity needs to make a legal contract and no LPA or deputy is in place, it may be necessary to go to the Court of Protection for a determination for the decision.

If it is clearly in the person's best interests (as determined using the best interests checklist MCA section 4) to spend the person's money this will be covered by section 5. This means there is legal protection for the person who spends the money of the person who lacks capacity to make that decision. (Code of Practice 6.58) (Part 8: Best interests decisions)

The Sale of Goods Act 1979 indicates that if someone who lacks capacity enters into a contract and the person providing the goods or services is aware that the person lacks capacity, the contract is not valid. However, MCA section 7 modifies this. The person providing goods or services can claim a reasonable sum, regardless of the validity of the contract, if the goods or services are 'necessary.' (Part 26: People who lack capacity to manage their money)

People who lack capacity can be vulnerable to people selling things at the door or on the phone. If someone who lacks capacity is persuaded to agree to spend money on something inappropriate consider if the seller was aware of their lack of capacity. It might be that either the seller was aware of the lack of capacity or it could be concluded that they did not make suitable efforts to ensure that the terms of the agreement were understood. It is then appropriate to consider if the goods are 'necessary'. Does the person need double glazing or an encyclopaedia? There is no protection in law unless

the goods can be shown to be necessary.

Tenancy Agreements

There is some confusion about how the law applies to people who may lack capacity to sign a tenancy and how agreements about their housing can be made. It is vitally important that any decisions are made on the basis of valid capacity assessments and that all decisions are fully recorded. If there is clear evidence of why decisions are made and actions taken it will be possible to justify that actions are taken in good faith, even if it is later found that the actions are unlawful. (Part 6: How to assess capacity) (Part 8: Best interests decisions) (Part 10: How to record decisions)

If someone who may lack capacity needs to make a tenancy agreement, be clear whether they have capacity to make this particular decision. A tenancy agreement can be a long and complex legal document – but the essential points are that it relates to where the person will live, that they agree to pay their rent and to look after their home, while the landlord agrees to see to repairs. Some people who may not be able to make some other decisions may be helped to understand this and will then be able to sign their own tenancy agreement. There are Easy Read tenancy agreements available.

If there is a Lasting Power of Attorney (Property and Affairs) or an Enduring Power of Attorney or a court-appointed Property and Affairs Deputy, that person should sign the tenancy agreement. The tenancy will be between the landlord and the person who lacks capacity. (Part 19: Lasting Powers of Attorney)

The landlord should never sign a tenancy agreement on behalf of the person who lacks capacity. This is not a valid tenancy. Family members should only sign a tenancy agreement if they have a valid and applicable LPA, EPA or have been appointed as deputy.

The local authority has no general power to sign tenancies for people who lack capacity. The local authority can only sign the tenancy agreement if appointed as deputy for Property and Affairs.

Under the common law 'doctrine of necessaries' it may be possible for someone who lacks capacity to hold a tenancy where there is no written agreement. If the person is able to maintain the tenancy – paying the rent, caring for the property, not acting in a way to cause nuisance – common law indicates that the 'tenant' owes suitable compensation to the landlord for occupying the property. However, this does not give the tenant legal protection; only the Disability Discrimination Act could protect the person if the landlord sought unreasonably to evict them. Recent case law (Whychavon

District Council v EM [2012]) shows that it is possible to claim Housing Benefit for an unsigned tenancy.

An unsigned tenancy or a tenancy signed by someone who lacked capacity to sign will be presumed to be valid unless it is ‘avoided’. A tenancy is ‘avoided’ either by the person regaining capacity, or a Deputy, EPA or LPA withdrawing from the agreement, or by the person not maintaining the conditions of the tenancy. The Disability Discrimination Act could offer the person who lacks capacity some protection in this case.

Anyone living in rented property needs to fulfil their obligations – to pay rent, to care for the property, not to sublet and not to use the property for illegal purposes. If someone does not have a formal tenancy agreement they do not have the protection of the law if they break these agreements.

If there is no-one who can sign the tenancy agreement, and it has been decided that it is not suitable or possible for the person to live with an unsigned tenancy, the only option is to go to Court of Protection for a decision.

https://new.devon.gov.uk/care-and-health/

Part 28 Consent and implied consent -

Code of Practice chapter 6; Code of Practice chapter 16

Issues of consent are particularly relevant if someone is being assessed for, or offered, medical treatment.

All hospitals and other providers of health care will have a consent policy. Staff should always comply with the policy of their employing agency, which will take account of the MCA Principles. (Part 2: The Principles)

The concept of implied consent suggests that if someone puts out their arm when a healthcare professional comes to take a blood sample, their action implies that they consent to this procedure. MCA suggests that this should not be assumed.

The question is whether the person understands the medical procedure that is being proposed and can retain and weigh up relevant information. MCA requires that a full explanation of the procedure is given; that there is a conversation with the person, and that consent is meaningful. (Part 6: How to assess capacity)

The consent of the patient must be obtained before any assessment or treatment can take place. This is equally true whether it is proposed to make small interventions such as taking blood, or larger interventions such as surgery. Without valid consent the patient could claim that an assault has been made on their person. (Part 12: Legal protection when applying MCA)

For consent to be valid the patient must be aware of the decision they are making and for what purpose and they must not be under duress. They must be able to refuse if they wish, for any reason.

On some occasions staff may feel that the decision is unwise. This does not make it invalid and does not prove that the person doesn't have capacity. Principle 3 states: 'A person is not to be treated as unable to make a decision merely because he makes an unwise decision'. (Part 2: The Principles)

Two part capacity assessment

Some patients will not be able to give consent. There could be a number of reasons for this (severe dementia, brain injury, learning disability, intoxication) and it may be a permanent or a temporary condition.

If the person may recover capacity to make the decision about treatment, the decision should be delayed if possible. It may be that it is not possible to delay. It may also be that the treatment may be what is needed for the person to recover; this needs to be clearly recorded. (Part 10: How to record decisions)

If after speaking to a patient it seems probable that they are unable to consent, and the assessment or treatment is necessary, you must carry out the two part assessment of their capacity. This can be done using a consent form for patients unable to consent or a specific Mental Capacity Act assessment form. Each healthcare provider organisation will have a local version of the consent form available on the local electronic recording system or in paper form. Both forms assist clinicians through the process. (Part 6: How to assess capacity) (Part 10: How to record decisions)

The Department of Health has created guidance on drawing up consent forms, and how to use them.

The decision-maker will need to determine the patient's ability to consent before starting a procedure. (Part 7: Being a decision-maker)

The outcome of the capacity test could be:

- the person has capacity and is able to sign a consent form or give verbal consent – the person's decision must be respected, even if it seems to be unwise
- the person lacks capacity at this time to make this decision. The clinician will need to decide if it is in the best interest of the patient to be given the assessment or treatment. Best interests decisions must be made in accordance with the MCA Principles. (Part 8: Best interests decisions)

In the case of an emergency assessment and treatment can take place under Common Law. (Part 29: Emergencies)

Consent to share information

Before any health or social care can be given, the person receiving care will need to give permission for information to be shared with other professionals or providers. If the person lacks capacity to make this decision the agency, in consultation with any representatives, will need to make a best interests decision about sharing information.

Everybody is protected by the Data Protection Act 1998. This requires organisations to:

- process personal information fairly and lawfully

- keep only necessary information
- use or share it only for stated purposes
- collect only information that is relevant
- keep information only for as long as necessary
- update information as appropriate.

All NHS services and local authorities are protected by a Caldicott Guardian – someone appointed to ensure the organisation handles information correctly. This requires the organisation to justify why they use confidential information, using a minimum of information when necessary, on a need-to-know basis and requires all staff to understand their responsibilities and comply with the law. (Part 30: Confidentiality)

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Part 29 Emergencies -

Code of Practice 3.6

In emergency medical situations it is sometimes necessary to give someone treatment without following the processes of MCA.

The MCA does not remove the common law doctrine of necessity which is used in emergencies. A common law principle is a legal concept which is established by case law and is accepted as legal. The doctrine of necessity indicates that someone who lacks capacity may be restrained using reasonable force and may be given treatment to which they have not consented which is necessary and in their best interests.

Before MCA came into force the doctrine of necessity was the legal basis by which people who did not have capacity to make decisions about their medical treatment were given treatment. MCA has changed this, in establishing the system for assessing capacity and deciding people's best interests. (Part 6: How to assess capacity) (Part 8: Best interests decisions) (Part 12: Legal protection when applying MCA)

In emergency situations it is possible to treat someone. If a clinician reasonably believes a person lacks capacity and that the proposed treatment is necessary to save their life or to prevent a significant deterioration in their condition the treatment can be given without formal documentation of the capacity assessment and best interests decision.

MCA does not give any clear indication as to how long it would be acceptable for decisions to be made under the doctrine of necessity. It is sensible to assume that as soon as someone's capacity can be formally assessed and their best interests decided, then this is what should happen. Clinicians should follow the consent process of their health provider agency. (Part 28: Consent and implied consent)

If the proposed treatment is not clearly necessary then MCA processes should always be followed.

Remember to check if there are any Welfare Lasting Power of Attorneys or Deputies, any valid and applicable Advance Decisions and consider if an application for an Independent Mental Capacity Advocate should be made. (Part 15: Independent Mental Capacity Advocates) (Part 17: Advance Decisions and Advance Statements) (Part 19: Lasting Powers of Attorney) (Part 23: The Court of Protection)

In an emergency someone can be conveyed to hospital without their consent and without a full assessment of their capacity. The emergency services will act on a

reasonable belief about someone’s capacity or act under the common law doctrine of necessities.

https://new.devon.gov.uk/care-and-health/

Part 30 Confidentiality -

Code of Practice 5.56-5.57; 4.55-4.56; chapter 16

The MCA requires the decision-maker to consult with anyone who knows the person who may lack capacity (MCA section 4). This means that a decision-maker may be speaking to several family members and friends. (Part 8: Best interests decisions)

There is concern that this may breach confidentiality. For instance, seeking a neighbour's views about someone's wishes to live at home rather than go into care, gives the neighbour more information about the person's condition than is appropriate.

It is important to:

- explain why you may be asking questions and seeking views, but be clear that you are unable to disclose anything that breaches confidentiality
- balance someone's right to confidentiality with the right to have decisions based on all possible available information.

Everybody is protected by the Data Protection Act 1998. This requires organisations to:

- process personal information fairly and lawfully
- keep only necessary information
- use or share it only for stated purposes
- collect only information that is relevant
- keep information only for as long as necessary
- update information as appropriate.

All NHS services and local authorities are protected by a Caldicott Guardian – someone appointed to ensure the organisation handles information correctly. This requires the organisation to justify why they use confidential information, using a minimum of information when necessary, on a need-to-know basis and requires all staff to understand their responsibilities and comply with the law.

https://new.devon.gov.uk/care-and-health/

Part 31 The Mental Capacity Act and the Mental Health Act -

Code of Practice chapter 13

The Mental Health Act (MHA) is used to ensure that people who need treatment for serious mental disorder receive this treatment, even against their wishes, if there are sufficient risks to their own health or safety, or risks to the safety of other people. People are referred to as being 'under section' or 'sectioned' – usually this means being admitted to a psychiatric hospital.

There are situations where MHA is the most appropriate piece of legislation, situations where MCA is most suitable and situations where both are needed. It can be difficult to determine which law applies; and in addition the MHA and MCA Codes of Practice are further developed by case law.

MHA may be the suitable piece of legislation to use if:

- the person needs to be deprived of their liberty to receive treatment for a mental disorder in a psychiatric unit
- they need treatment for their mental disorder but do not lack capacity
- they need treatment that can't be provided under MCA – for example because of an Advance Decision
- the risks are to other people and not to the person themselves. Principle 4 of MCA is clear that best interests decisions can only be made to address risks faced by the person who lacks capacity. MHA, in contrast, can be used to address risks to the person's health or safety or the safety of other people.

The Mental Health Act:

- doesn't differentiate between people who have capacity and those who don't – decisions are made about the nature or degree of someone's mental disorder.
- has no age limits
- allows for people to be deprived of their liberty
- overrules any Advance Decisions – however, if someone makes an Advance Decision refusing ECT (electro-convulsive therapy) this cannot be overruled. ECT can then only be given in an emergency to save someone's life (MHA section 58A)
- has a process to identify the person's nearest relative who must be informed or consulted about many decisions and can veto some decisions
- has clear criteria for all decisions taken under MHA; there are set assessment procedures, prescribed professional roles and set methods of recording decisions. There are rigorous review and appeal processes.

MCA covers decisions about all aspects of someone's life while MHA only applies to assessment and treatment for mental disorder. This means that someone who is detained in hospital under MHA for treatment of their mental disorder will also need to be assessed under MCA to see if they have capacity to make decisions about treatment for physical illness.

The MCA applies to anyone who may have 'an impairment of or disturbance in the functioning of the mind or brain.' The MHA applies to 'any disorder or disability of the mind.' By excluding 'the brain' the MHA's application is limited

If someone needs serious medical treatment for a physical illness their capacity to make this decision should be assessed. The process of assessment must include consultation with others. If there is no family or friends who can be consulted the person must be referred for Independent Mental Capacity Advocate support. (Part 16: Serious medical treatment)

Psychiatric units

When someone is ready to move on from in-patient treatment in a psychiatric unit some decisions may be made under the Mental Health Act, but most will be made under MCA. The person's capacity to make decisions about future care options should be assessed, and if they lack capacity a best interests decision process should be followed. If the person is unbefriended and a decision is being made about a change of accommodation, a referral must be made for Independent Mental Capacity Advocate support. (Part 15: Independent Mental Capacity Advocates)

If someone is in psychiatric hospital and is seeking to leave or is refusing treatment they may be deprived of their liberty. They should be enabled to make their own decision about care and treatment, or a legal process needs to be followed to authorise their detention.

If someone is in hospital and is deprived of their liberty consider these questions.
1. Does the person have capacity to make the decision about their care and treatment?
Yes – MCA does not apply. Use MHA or allow the person to leave/refuse treatment
No – MCA or MHA may apply. Consider the next question.

2. Does the person meet the criteria for detention under MHA?
Yes – use MHA to detain for treatment of their mental disorder
No – use MCA Deprivation of Liberty Safeguards to authorise their detention.

Case law (GJ v The Foundation Trust [2009]) indicates that practitioners can't choose whether to use MHA or MCA, even if they feel MCA DoLS would be less restrictive for the person. If someone is eligible for detention under MHA this law must be used. MCA DoLS can only be used for people who can't be detained under MHA. This is different to some of the guidance in the Code of Practice. (Part 32: Deprivation of Liberty Safeguards)

https://new.devon.gov.uk/care-and-health/

Part 32 Deprivation of Liberty Safeguards -

Code of Practice 6.49; Deprivation of Liberty Code of Practice

The Deprivation of Liberty Safeguards (DoLS) is an amendment to the Mental Capacity Act introduced in 2009. It is a system of assessments and authorisations which ensures legal protection for people who lack capacity and whose care needs to be given in circumstances which will deprive them of their liberty. The information here is only an introduction.

Some staff will need to be familiar with the full process of applying for a Deprivation of Liberty authorisation. All staff need to be aware of DoLS and need to be aware of how to raise a concern if they feel someone may be being deprived of their liberty.

The Deprivation of Liberty Safeguards only:

- apply to people who lack capacity
- apply to people aged 18 or over
- apply to people in hospital, nursing homes or residential homes – they don't apply to people supported in rented accommodation
- allow consideration of risks to that person – they can't be used to manage risks to other people
- authorise where the person is – they don't authorise the treatment the person is receiving; this will need to be considered under MCA.

What is a Deprivation of Liberty?

Depriving someone of their liberty may be a necessary process due to their circumstances. People in prison, or are detained in hospital under the Mental Health Act, are deprived of their liberty. This is legal because due legal process has been followed to make these decisions.

Some people who lack capacity to make decisions about their care may need to be deprived of their liberty. This may be because they aren't able to co-operate with the decision about where they live.

MCA s6 allows for the restriction of someone's movement if:

1. the person lacks capacity
2. the action taken is in their best interests and is a proportionate response to risks posed to that person.

MCA section 6 does not allow for the person to be deprived of their liberty. (Part 14: Restraint)

The difference between deprivation of liberty and restriction of movement is about 'degree and intensity' rather than 'nature or substance'. This means it is not possible to produce a list of things which will indicate a deprivation – each person's situation needs to be assessed individually. The same locked door may be a restriction of one person's movement and a deprivation of another person's liberty.

To consider if someone is deprived or restricted it is helpful to consider:

- the type of restraint – a locked door may not be a deprivation, but repeated use of sedation is likely to be
- the duration of restraint – immediate restraint to prevent harm will generally be covered by MCA section 5, but if the restraint continues it may lead to deprivation. Grabbing someone to stop them walking into traffic once would be restraint: if they were then stopped from going outside in case they ran into the road this might be a deprivation
- the effects of the restraint for the person involved. How do they feel about the restrictions put on them? If someone is distressed about the locked door and keeps trying to leave they may be being deprived, whereas someone who is able to accept that they need to stay somewhere safe may not be deprived by a locked door.
- the implementation of the restraint. How was it decided that this restraint was necessary? Is this the least restrictive alternative? Was the restraint agreed in negotiation with the person's family? Are there proper reviews and risk assessments in place?

Factors that should lead you to consider if someone is deprived of their liberty.

- Is the person repeatedly trying to leave the unit? Or if they are physically not able to attempt to leave are they purposefully talking about wanting to leave?
- Are there measures being taken to prevent the person from going, such as a locked door or a security guard in place?
- Is the person distressed about being where they are? Are they resisting interventions from staff?
- Are staff controlling all the person's movements and actions?
- Is sedating medication being repeatedly used to control the person's movements or behaviour?
- Are family and friends opposed to the person's placement?

None of these factors will necessarily mean that someone is being deprived of their liberty, but should lead to a more detailed consideration of their situation.

What to do if you think someone may be deprived of their liberty

Make sure your views are considered.

Every hospital, nursing home and residential home must have a policy about how to apply for a DoLS authorisation. There will be a senior member of staff identified who have responsibility to consider if someone is being deprived and to make the necessary referrals. Any member of staff who thinks a deprivation is taking place must speak to the senior member of staff on duty and pass on their concerns.

Any visiting professional or personal visitor who is concerned about a deprivation of liberty must pass on their concerns to the managers of the unit, who must then take suitable action.

The management of the unit will need to contact the local Deprivation of Liberty team to make a referral. If your concerns are not responded to appropriately it is possible to make a Third Party Referral for an assessment. Contact the local Deprivation of Liberty team. (Contact details)

It is always sensible to contact the local DoLS team to discuss a referral. It may be that it is decided the person is not being deprived, or that another route is more suitable (such as Mental Health Act). The DoLS team will be able to give expert advice.

After a referral for an authorisation there will be a process of assessment. The full assessment comprises six individual assessments.

It may be that it is assessed that the person is not deprived of their liberty. It may be possible to alter someone's care plan so that they are no longer deprived. It may be agreed that they need to be deprived and this will be authorised for a specified period of time. It may be that it is felt that the person is deprived, but that this is not appropriate and is not authorised so changes will need to be made to the person's care plan to ensure that the deprivation ceases. You will be informed of the outcome of the assessment.

https://new.devon.gov.uk/care-and-health/

Contact details -

Referrals

Devon – Care Direct **0345 1551 007**
For referrals for any social care or assessment, including all safeguarding referrals

Torbay – Customer Service Centre **01803 219700** or csc.torbaycaretrust@nhs.net
For all referrals, apart from safeguarding

Torbay Safeguarding Adults Team **01803 219888** or safeguarding.alertsTCT@nhs.net
For all safeguarding referrals and information and advice on safeguarding

Mental Capacity Act Lead and Safeguarding Adults Team

Devon – **01392 382339** or safeguardingadults-mailbox@devon.gov.uk
Torbay – 01803 219831 or safeguardingtorbay@nhs.net

Deprivation of Liberty Safeguards Team

Devon – **01392 381676** or dols@devon.gov.uk
Torbay – **01803 219832** or dolstorbay@nhs.net

NHS services

Royal Devon and Exeter Hospital Trust Safeguarding/MCA/DoLS Lead – **01392 411611**

Northern Devon Health Care Trust including North Devon District Hospital and Community Hospitals Safeguarding Lead/MCA/DoLS Lead – **01392 356917**

South Devon Health Care Trust including Torbay Hospital Safeguarding Lead/MCA/DoLS Lead – **01803 655857**
North, East and West (NEW) Devon Safeguarding Lead **01392 205205**

Derriford Hospital

MCA/DoLS Lead – **01752 439497**
Safeguarding Lead – **01752 431664**
Devon Partnership Trust Safeguarding Lead – **01392 208687**
MCA Lead – **01392 675671**

Complaints

Devon County Council – **0808 1683750** or customer.relations@devon.gov.uk
South Devon Healthcare Trust (inc Torbay hospital) PALS – **0800 0282037** or pals.sdhc@nhs.net
Royal Devon and Exeter Hospital – **01392 403915** or rde-tr.Complaints@nhs.net
North Devon District Hospital PALS – **01272 314090** or pals@ndevon.swest.nhs.uk
Derriford Hospital PALS – **0845 1558123** or **01752 439884** or plh-tr.PALS@nhs.net
NEW Devon PALS – **01392 267665** or **0300 123 16725** or pals.devon@nhs.net
Devon Partnership Trust – **0800 0730741** or dpn-tr.pals@nhs.net

Independent Mental Capacity Advocates

Devon and Torbay **0845 2311900** or imca.devon@nhs.net

Approved Mental Health Practitioners

Devon AMHP Hub – **01392 674952**
Torbay AMHP – **01803 617260**

Office of the Public Guardian

0300 456 0300 or customerservices@publicguardian.gsi.gov.uk
www.justice.gov.uk/about/opg

Court of Protection Team

Devon – **01392 383715** or **01392 383725**
Torbay Finance Officer (client proxy) – **01803 210437**

Mediation

National Mediation Helpline – **0845 6030809** www.nationalmediationhelpline.com
South West Mediation – **01392 678010** www.southwestmediation.co.uk
National Family Mediation – **0300 4000 636** www.nfm.org.uk