**Mental Capacity Act Policy**

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# Introduction

## Policy statement

All staff should have a good understanding of the [Mental Capacity Act (MCA) 2005](https://www.legislation.gov.uk/ukpga/2005/9/contents) and the Deprivation of Liberty Safeguards (DoLS) to ensure that they can act in a patient’s best interest;[[1]](#footnote-1) this includes changes introduced through the [Mental Capacity (Amendment) Act 2019](https://www.legislation.gov.uk/ukpga/2019/18/enacted). The purpose of this document is to advise all staff of the principles of the MCA 2005 and how it applies to them in their individual roles at Sheerwater Health Centre**.**

**This policy should be read in conjunction with CQCs** [GP Mythbuster 10: GPs and the Mental Capacity Act 2005 and Deprivation of Liberty Safeguards](https://www.cqc.org.uk/guidance-providers/gps/gp-mythbuster-10-gps-mental-capacity-act-2005-deprivation-liberty-safeguards)**.**

## Status

This document and any procedures contained within it are non-contractual and may be modified or withdrawn at any time. For the avoidance of doubt, it does not form part of your contract of employment.

## Training and support

The organisation will provide guidance and support to help those to whom it applies to understand their rights and responsibilities under this policy. Additional support will be provided to managers and supervisors to enable them to deal more effectively with matters arising from this policy.

# Scope

## Who it applies to

This document applies to all employees of the organisation and other individuals performing functions in relation to the organisation, such as agency workers, locums and contractors. Furthermore, it also applies to clinicians who may or may not be employed by the organisation but who are working under the Additional Roles Reimbursement Scheme (ARRS).[[2]](#footnote-2)

## Why and how it applies to them

This document explains the MCA 2005 and the DoLS and how they apply to daily practice at Sheerwater Health Centre. It is to be read in conjunction with the referenced publications. Staff are to adhere to the direction given within this policy.

The organisation aims to design and implement policies and procedures that meet the diverse needs of our service and workforce, ensuring that none are placed at a disadvantage over others, in accordance with the [Equality Act 2010](https://www.legislation.gov.uk/ukpga/2010/15/contents). Consideration has been given to the impact this policy might have with regard to the individual protected characteristics of those to whom it applies.

# Definition of terms

## Mental Capacity Act 2005

The Mental Capacity Act (MCA) 2005 applies to everyone involved in the care, treatment and support of people aged 16 and over, living in England and Wales, who are unable to make all or some decisions for themselves.[[3]](#footnote-3)

## Mental Capacity (Amendment) Act 2019

An Act to amend the Mental Capacity Act 2005 in relation to procedures in accordance with which a person may be deprived of liberty where the person lacks capacity to consent.

## Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards (DoLS) is a legal framework that exists to ensure that individuals who lack the mental capacity to consent to the arrangements for their care, where such care may (because of restrictions imposed on an individual’s freedom of choice or movement) amount to a ‘deprivation of liberty’, have the arrangements independently assessed to ensure they are in the best interests of the individual concerned.[[4]](#footnote-4)

## Liberty Protection Safeguards

DoLS was scheduled to be replaced with the Liberty Protection Safeguards (LPS) on the 1st of October 2020 although was deferred until April 2022[[5]](#footnote-5).

Whilst there was a DHSC document titled [Liberty Protection Safeguards: what they are](https://www.gov.uk/government/publications/liberty-protection-safeguards-factsheets/liberty-protection-safeguards-what-they-are) released in August 2021 advising that this is still to be implemented, at the time of this update, nothing further has been added that provides any detail, or timescales of LPS.

## Independent Mental Capacity Advocate (IMCA)

The primary focus of IMCAs in safeguarding adults’ proceedings relates to the decisions concerning protective measures (including decisions not to take protective measures). IMCAs have a statutory role to represent and support the person at risk in relation to these decisions which must comply with the MCA.[[6]](#footnote-6)

## Lacks capacity

‘Lacks capacity’ is a term used to describe a person who 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.[[7]](#footnote-7)

## Approved Mental Capacity Professionals (AMCPs)

Approved Mental Capacity Professionals (AMCPs) are practitioners with specialist training in the MCA whose role is to provide an independent check, known as a pre-authorisation review, on whether the conditions for a deprivation of liberty have been met.[[8]](#footnote-8)

# Legislation

## MCA 2005

The principles of the MCA 2005 are:[[9]](#footnote-9)

|  |  |
| --- | --- |
| **Principle** | **Explanation** |
| A person must be assumed to have capacity unless it is established that they lack capacity | This principle states that every adult has the right to make their own decisions unless there is evidence they lack the capacity to make a particular decision when it needs to be made.  It is important to balance people’s right to make a decision with their right to safety and protection when they cannot make decisions to protect themselves. However, the starting assumption must always be that an individual has the capacity, until there is proof that they do not. |
| A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success. | It is important to do everything practical to help a person make a decision for themselves before concluding that they lack capacity to do so. People with an illness or disability affecting their ability to make a decision should receive support to help them make as many decisions as they can.  This principle aims to stop people being automatically labelled as lacking capacity to make particular decisions. Because it encourages individuals to play as big a role as possible in decision-making, it also helps prevent unnecessary interventions in their lives. |
| A person is not to be treated as unable to make a decision merely because they make an unwise decision. | Everybody has their own values, beliefs, preferences and attitudes. A person should not be assumed to lack the capacity to make a decision just because other people think their decision is unwise. This applies even if family members, friends or healthcare or social care staff are unhappy with a decision.  There may be cause for concern if somebody:   * Repeatedly makes unwise decisions that put them at significant risk of harm or exploitation * Makes a particular unwise decision that is obviously irrational or out of character   These things do not necessarily mean that somebody lacks capacity. But there might be need for further investigation, taking into account the person’s past decisions and choices. |
| 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 their best interests. | The principle of acting or making a decision in the best interests of a person who lacks capacity to make the decision in question is a well-established principle in the common law.  A person’s best interests must be the basis for all decisions made and actions carried out on their behalf in situations where they lack capacity to make those particular decisions for themselves.  It is impossible to give a single description of what ‘best interests’ are, because they depend on individual circumstances. |
| 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. | Before somebody makes a decision or acts on behalf of a person who lacks capacity to make that decision or consent to the act, they must always question if they can do something else that would interfere less with the person’s basic rights and freedoms. This is called finding the ‘less restrictive alternative’. It includes considering whether there is a need to act or make a decision at all.  Where there is more than one option, it is important to explore ways that would be less restrictive or allow the most freedom for a person who lacks capacity to make the decision in question. However, the final decision must always allow the original purpose of the decision or act to be achieved.  Any decision or action must still be in the best interests of the person who lacks capacity so sometimes it may be necessary to choose an option that is not the least restrictive alternative if that option is in the person’s best interests. In practice, the process of choosing a less restrictive option and deciding what is in the person’s best interests will be combined but both principles must be applied each time a decision or action may be taken on behalf of a person who lacks capacity to make the relevant decision. |

The Act applies to people aged 16 and over. For children aged under 16, the Act does not generally apply. However, there are two exceptions. The Court of Protection can make decisions about a child’s property or finances if the child lacks capacity to make such decisions and is still likely to lack capacity to make financial decisions when they reach the age of 18.

## Best interests

Staff at Sheerwater Health Centre must understand the best interests principle if the Act is to be applied effectively. Although the term ‘best interests’ is not defined in the Act, it is essential that clinicians consider the common factors when deciding what is in the best interests of a patient who lacks capacity.

The common factors checklist is as follows:10

* Working out what is in someone’s best interests cannot be based simply on someone’s age, appearance, condition or behaviour
* All relevant circumstances should be considered when working out someone’s best interests
* Every effort should be made to encourage and enable the person who lacks capacity to take part in making the decision
* If there is a chance that the person will regain the capacity to make a particular decision, then it may be possible to put off the decision until later if it is not urgent
* Special considerations apply to decisions about life-sustaining treatment
* The person’s past and present wishes and feelings, beliefs and values should be taken into account
* The views of other people who are close to the person who lacks capacity should be considered, as well as the views of an attorney or deputy

In emergency situations, urgent decisions will be made, and immediate necessary action(s) taken, in the best interests of the individual as it may not be practical to delay treatment. However, regardless of the scenario, staff at Sheerwater Health Centre must try to communicate with the patient and keep them informed of what is happening.

## Deprivation of Liberty Safeguards[[10]](#footnote-10)

The Deprivation of Liberty Safeguards (DoLS) procedure is designed to protect an individual’s rights if they are deprived of their liberty in a hospital or care home in England or Wales and they lack mental capacity to consent to being there. If it is assessed that an individual does not have capacity to consent to care or treatment it may be necessary, in the individual’s best interests, for other people to decide to place the individual somewhere to receive the required level of care.

A deprivation of liberty has three elements:

1. Objective element – confinement in a restricted space for a non-negligible period of time
2. Subjective element – the person has not validly consented to confinement
3. The detention being attributable to the state

The Supreme Court ruled that there is a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights (ECHR) if a patient is under continuous supervision and control, is not free to leave and they lack capacity to consent to said arrangements.

Factors identified as not relevant to a deprivation of liberty determination include:

* Whether the individual agrees or disagrees with their detention
* The purpose of the detention
* The extent to which it enables the individual to live what may be considered a normal life. This means the individual is not compared with another individual in determining whether there is a deprivation of liberty

The DoLS state that deprivation of liberty:

* Should be avoided whenever possible
* Should only be authorised in cases where it is in the relevant person’s best interest and the only way to keep them safe
* Should be only for a particular treatment plan or course of action
* Should be for as short a time as possible

Key elements of the DoLS are:[[11]](#footnote-11)

* It is in the individual’s best interests to take away their liberty. This means it is necessary to prevent harm to them and the detention is proportionate, looking at how likely they are to suffer harm and how serious the harm may be.
* It has become an unavoidable necessity to take away the individual’s liberty. Every effort should be made to prevent it from becoming a necessity.
* DoLS can only be used to deprive an individual of their liberty at a care home or hospital. They cannot be used to take an individual from their home to a care home or hospital. This would need an order from the Court of Protection.

Prior to the authorisation of a deprivation of liberty, the patient will need to undergo six assessments:12

1. Age assessment
2. No refusals assessment
3. Mental capacity assessment
4. Mental health assessment
5. Eligibility assessment
6. Best interests assessment

All six assessments must be met in order for authorisation to be granted for the deprivation of liberty.

# Assessment

## Assessing capacity10

In accordance with the MCA 2005, adults are assumed to have capacity to make autonomous decisions unless it can be demonstrated that they lack capacity to make such decisions. This is referred to as the presumption of capacity.

All staff at Sheerwater Health Centre should, when appropriate, discuss any behavioural issues witnessed or reported by patients’ families to the clinician dealing with the patient. It is the responsibility of the clinician to determine the patient’s ability to consent to any proposed treatment, medication or referrals.

Prior to deciding if a patient does lack capacity in relation to a particular decision, they should be afforded every opportunity to make the decision. This includes:

Providing relevant information, including choice regarding alternative treatment/procedures

* Communicating in an appropriate way, i.e., presenting information in a different manner so it is easier for the patient to understand
* Putting the patient at ease, discussing the matter when the patient feels confident to do so, such as in the morning or afternoon
* Seeking additional support so the patient has a friend or relative with them who is able to help them understand and make a choice

When assessing an individual’s ability to make a decision, the MCA 2005 Code of Practice states that the two-stage test of capacity is to be used:

* Does the person have an impairment of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works? (It does not matter if the impairment or disturbance is temporary or permanent.)
* If so, does the impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made?

According to the Act, a person is unable to make a decision if they are unable to do any one of the following:

* Understand information about the decisions to be made
* Retain that information in their mind
* Use or weight that information as part of the decision-making process
* Communicate their decision

Furthermore, at Sheerwater Health Centre should there be concern regarding a patient’s capacity, the following question set will be used:

* Does the person have all the relevant information they need to make the decision?
* If they are making a decision that involves choosing between alternatives, do they have information on all the different options?
* Would the person have a better understanding if information were explained or presented in another way?
* Are there times of day when the person’s understanding is better?
* Are there locations where they may feel more at ease?
* Can the decision be put off until the circumstances are different and the person concerned may be able to make the decision?
* Can anyone else help the person to make choices or express a view (for example, a family member or carer, an advocate or someone to help with communication)?

Detailed guidance and supplementary information regarding the test can be found in the referenced Code of Practice.

## Fluctuating capacity10

Staff at Sheerwater Health Centre are to be aware that some patients may have fluctuating capacity; that is, they have a problem or condition that gets worse occasionally and affects their ability to make decisions. For example, a patient with a psychotic illness may have delusions that affect their capacity to make decisions at certain times but that disappear at others.

Temporary factors affecting capacity can include but are not limited to acute illness, severe pain, medication effects, distress and shock.

## Lack of capacity

A person is defined as lacking capacity if they are unable to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken.

Patients lacking capacity have the following rights:

* All decisions will be made in the best interest of the patient
* The liberty of a patient will only be taken in very specific situations. This is referred to as a deprivation of liberty (DoL) and will only be used if it is the least restrictive way of keeping a patient safe or ensuring the correct medical treatment is provided
* To have support from an advocate; this is someone who acts on the patient’s behalf but does not have legal authority to make personal or financial decisions on behalf of the patient
* To have a deputy appointed by the court to make personal or financial decisions for the patient
* To receive guidance from the Court of Protection

## Independent Mental Capacity Advocates (IMCA) 10

The purpose of the IMCA service is to help particularly vulnerable people who lack the capacity to make important decisions about serious medical treatment and changes of accommodation, and who have no family or friends that it would be appropriate to consult about those decisions.

An IMCA must be instructed and subsequently consulted for those patients who lack capacity and have no support network in the following circumstances:

* When an NHS body is proposing to provide serious medical treatment
* When an NHS body or local authority is proposing to arrange accommodation in a hospital or a care home (including moving care homes)
* When the person will stay in hospital for longer than 28 days
* When the person will stay in the care home for longer than eight weeks

An IMCA may also be instructed to support someone who lacks capacity to make decisions concerning care reviews (where no-one else is available to be consulted) and adult protection cases (whether or not family, friends or others are involved).

As the IMCA’s role is to support and represent the individual lacking capacity, they have the right to see the relevant healthcare and social care records.

## Instructing an IMCA

If any of the criteria at [Section 5.3](#_Lack_of_capacity) are met, Sheerwater Health Centre is to consider whether it is responsible for instructing an IMCA. Furthermore, the organisation needs to be satisfied that:

* Instructing an IMCA will be beneficial to the person lacking capacity
* The best interests checklist has been completed
* The referrer will consider the IMCA report and recommendations

Instructing an IMCA in relation to a patient at Sheerwater Health Centre can be done using the links on the SCIE [website](https://www.scie.org.uk/mca/imca/find) which has links to IMCA providers in England and Wales. Sheerwater Health Centre lies within Surrey; the telephone number for the local IMCA service is 01276 28515, the email address is [imca@justadvocacy.org.uk](mailto:imca@justadvocacy.org.uk) and the link to the online referral form is [www.justadvocacy.org.uk](http://www.justadvocacy.org.uk).

Further detailed guidance regarding the role of the IMCA can be found in the document referenced at Footnote 10.

# Useful terminology

## Advance decisions[[12]](#footnote-12)

An advance decision (sometimes known as an advance decision to refuse treatment, an ADRT or living will) is a decision made by the patient to refuse certain treatment types in the future, should they lose the capacity to make such decisions at a later date.

The patient must specify which treatments they are refusing in the advance decision.

## Advance statement[[13]](#footnote-13)

An advance statement is a written statement that sets down the preferences, wishes, beliefs and values regarding the future care of the patient, the purpose of which is to provide a guide to those who may have to make decisions on behalf of the patient (in their best interest) if the patient has lost the capacity to make or communicate said decisions.

## Power of attorney[[14]](#footnote-14)

The following are types of power of attorney:

* Lasting power of attorney
* Enduring power of attorney

The lasting power of attorney covers personal welfare, property and financial affairs, whereas the enduring power of attorney only deals with property and financial affairs.

Detailed information can be found at Footnote 11.

## Court of Protection[[15]](#footnote-15)

The court has the power to make a declaration about whether an adult (or a child in some cases) has or lacks capacity, and to appoint a deputy to make a decision on behalf of a person lacking capacity. There are two kinds of deputy, one for property and financial affairs and the other for personal welfare. Disputes over a person’s capacity, or what treatment is in their best interest, can be referred to this court.

# Summary

All staff at Sheerwater Health Centre may, on occasion, deal with patients who lack capacity. It is essential that staff are able to deal with such patients effectively. Clinical staff must understand the guidance outlined in the MCA 2005, Mental Capacity (Amendment) Act 2019 and the MCA 2005 Code of Practice and apply in practice when necessary.

Furthermore, clinicians must have an understanding of the DoLS and the term ‘best interests’ to ensure that the level of care provided at Sheerwater Health Centre is effective, safe and meets the requirements of the aforementioned guidance documentation.

1. [CQC](https://www.cqc.org.uk/guidance-providers/gps/nigels-surgery-10-gps-mental-capacity-act-2005-deprivation-liberty-safeguards) [↑](#footnote-ref-1)
2. [Network DES specification](https://www.england.nhs.uk/publication/network-contract-des-specification-2021-22/) [↑](#footnote-ref-2)
3. [Social Care Institute for Excellence – MCA 2005](https://www.scie.org.uk/mca/introduction/mental-capacity-act-2005-at-a-glance) [↑](#footnote-ref-3)
4. [PHE – deprivation of liberty safeguards (January 2020)](https://www.gov.uk/government/publications/people-with-learning-disabilities-in-england/chapter-6-deprivation-of-liberty-safeguards) [↑](#footnote-ref-4)
5. [Hill Dickinson – Liberty Protection Safeguards](https://www.hilldickinson.com/insights/articles/liberty-protection-safeguards-%E2%80%93-delayed-until-2022) [↑](#footnote-ref-5)
6. [Social Care Institute for Excellence – The role of the IMCA](https://www.scie.org.uk/publications/guides/guide32/imcarole.asp) [↑](#footnote-ref-6)
7. [MCA 2005 – People who lack capacity](https://www.legislation.gov.uk/ukpga/2005/9/part/1) [↑](#footnote-ref-7)
8. [Community Care Function of new AMCP role](https://www.communitycare.co.uk/2018/11/29/government-extend-remit-approved-mental-capacity-professionals-dols-replacement-scheme-improve-protections-service-users/) [↑](#footnote-ref-8)
9. [MCA 2005 – Code of Practice](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf) [↑](#footnote-ref-9)
10. [Age UK Deprivation of Liberty Safeguards](https://www.ageuk.org.uk/globalassets/age-uk/documents/factsheets/fs62_deprivation_of_liberty_safeguards_fcs.pdf#:~:text=The%20Deprivation%20of%20Liberty%20Safeguards%20%28DoLS%29%20procedure%20is,lack%20mental%20capacity%20to%20consent%20to%20being%20there.) [↑](#footnote-ref-10)
11. [MIND – Deprivation of liberty](https://www.mind.org.uk/information-support/legal-rights/mental-capacity-act-2005/deprivation-of-liberty/#.WzC_9C2ZOi5) [↑](#footnote-ref-11)
12. [NHS Advance decision](https://www.nhs.uk/conditions/end-of-life-care/advance-decision-to-refuse-treatment/) [↑](#footnote-ref-12)
13. [NHS Advance statement](https://www.nhs.uk/conditions/end-of-life-care/advance-statement/) [↑](#footnote-ref-13)
14. [NHS Power of attorney](https://www.nhs.uk/conditions/social-care-and-support/lasting-power-of-attorney/) [↑](#footnote-ref-14)
15. [CQC](https://www.cqc.org.uk/guidance-providers/gps/nigels-surgery-10-gps-mental-capacity-act-2005-deprivation-liberty-safeguards) [↑](#footnote-ref-15)