

Mental Capacity Act Policy

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Table of contents

1	Introduction	2
1.1	Policy statement	2
1.2	Status	2
1.3	Training and support	2
2	Scope	2
2.1	Who it applies to	2
2.2	Why and how it applies to them	2
3	Definition of terms	3
3.1	Mental Capacity Act 2005	3
3.2	Deprivation of Liberty Safeguards	3
3.3	Independent Mental Capacity Advocate (IMCA)	3
3.4	Lacks capacity	3
4	Legislation	3
4.1	MCA 2005	3
4.2	Best interests	4
4.3	Deprivation of Liberty Safeguards	4
5	Assessment	5
5.1	Assessing capacity	5
5.2	Lack of mental capacity	6
5.3	Independent Mental Capacity Advocates (IMCA)	6
5.4	Instructing an IMCA	7
6	Useful terminology	7
6.1	Advance decisions	7
6.2	Advance statement	7
6.3	Power of attorney	8
6.4	Court of Protection	8

1 Introduction

1.1 Policy statement

GPs and their staff should have a good understanding of the Mental Capacity Act (MCA) 2005 and the Deprivation of Liberty Safeguards (DoLS) to ensure that they can act in a patient's best interest.¹ 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 Thanet Health Community Interest Company (TH CIC).

1.2 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This document and any procedures contained within it are non-contractual and may be modified or withdrawn at any time.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.

1.3 Training and support

The TH CIC will provide guidance and support to help those to whom it applies 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.

2 Scope

2.1 Who it applies to

This document applies to all employees of the company and other individuals performing functions in relation to the company, such as agency workers, locums and contractors.

2.2 Why and how it applies to them

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

The company 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. Consideration has been given to the impact this policy might have in regard to the individual protected characteristics of those to whom it applies.

¹ [CQC](#)

3 Definition of terms

3.1 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.²

3.2 Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards are an amendment to the MCA 2005. They apply in England and Wales only. The MCA 2005 allows restraint restrictions to be used, but only if they are in a person's best interests. Extra safeguards are needed if the restrictions and restraint used will deprive a person of their liberty.³

3.3 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.⁴

3.4 Lacks capacity

'Lacks capacity' is a term used to describe a person who lacks capacity to make a particular decision or to take a particular action for themselves at the time the decision or action needs to be taken.

4 Legislation

4.1 MCA 2005

The principles of the MCA 2005 are:⁵

- A person must be assumed to have capacity unless it is established that they lack capacity
- 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
- A person is not to be treated as unable to make a decision merely because they make an unwise decision
- 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

² [Social Care Institute for Excellence – MCA 2005](#)

³ [Social Care Institute for Excellence – DoLS](#)

⁴ [Social Care Institute for Excellence – The role of the IMCA](#)

⁵ [Mental Capacity Act 2005](#)

- 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

4.2 Best interests

Staff at Thanet Health Community Interest Company 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:⁶

- 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

4.3 Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards (DoLS) provide protection for vulnerable people accommodated within a care home or hospital in circumstances that amount to deprivation of their liberty and who lack the capacity to consent to the care or treatment they require. The DoLS state that deprivation of liberty:⁷

- 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:⁸

- 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.

⁶ [MCA 2005 Code of Practice](#)

⁷ [NHS Consent, Mental Capacity and Deprivation of Liberty Safeguards](#)

⁸ [MIND – Deprivation of liberty](#)

- 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:

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

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

5 Assessment

5.1 Assessing capacity

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 Thanet Health Community Interest Company 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:⁶

- 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:⁶

- 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 Thanet Health Community Interest Company, 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.

5.2 Lack of mental 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

5.3 Independent Mental Capacity Advocates (IMCA)

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.⁶

An IMCA must be instructed and subsequently consulted, for those patients who lack capacity and have no support network, in the following circumstances:⁶

- When an NHS body is proposing to provide serious medical treatment
- When an NHS body or local authority is proposing to arrange accommodation in 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

5.4 Instructing an IMCA

If any of the criteria at paragraph 5.3 are met, Thanet Health Community Interest Company are to consider whether they are responsible for instructing an IMCA. Furthermore, the practice 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 Thanet Health Community Interest Company can be done using the links on the SCIE [website](#) which has links to IMCA providers in England and Wales. Thanet Health Community Interest Company lies within East Kent; the telephone number for the local IMCA service is 0845 832 0044, the email address is info@advocacyforall.org.uk and the link to the online referral form is <http://www.advocacyforall.org.uk/referral.php>.

Further detailed guidance regarding the role of the IMCA can be found in the document referenced at footnote 6.

6 Useful terminology

6.1 Advance decisions⁹

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.

6.2 Advance statement¹⁰

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.

⁹ [NHS Advance decision](#)

¹⁰ [NHS Advance statement](#)

6.3 Power of attorney¹¹

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.

6.4 Court of Protection¹²

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.

7 Summary

All staff at Thanet Health Community Interest Company may deal with patients on occasion 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 and the MCA 2005 Code of Practice and apply it 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 Thanet Health Community Interest Company is effective, safe and meets the requirements of the aforementioned guidance documentation.

¹¹ [NHS Power of attorney](#)

¹² [CQC](#)