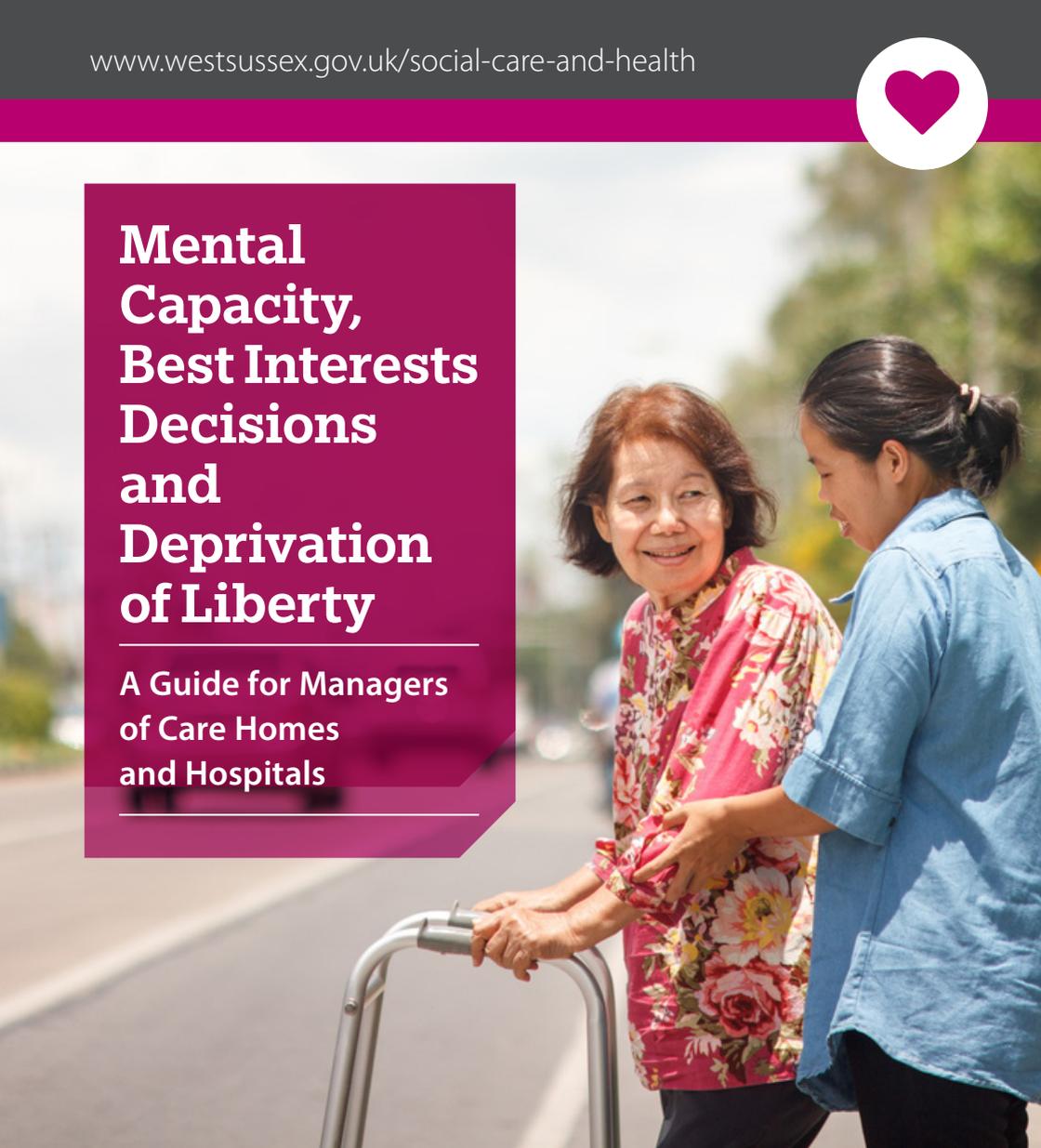




Mental Capacity, Best Interests Decisions and Deprivation of Liberty

A Guide for Managers
of Care Homes
and Hospitals



Working in partnership

Introduction

Mental capacity refers to the ability of a person to make their own decisions.

The Mental Capacity Act 2005 ('The Act') applies to everyone involved in the care, treatment and support of people aged 16 and over who are unable to make all or some decisions for themselves. The Act sets out the legal framework for the protection and safeguarding of these people.

This leaflet reminds you of:

- What consent is and the steps you must follow to assess if a person is unable to make a particular decision;
- how to make a decision in their best interests if they lack capacity;
- what to do when decisions were made in advance; and
- the processes for deprivation of liberty authorisation (aged 18 years and over).

Consent

When assessing someone's ability to consent to an action, you are considering if they understand the:

- nature (what is it about?);
- purpose (why is it necessary to make the decision?); and
- consequences (risk/consequences/outcomes) of giving or refusing consent and of not making the decision.

It is your responsibility to provide the above information to the person. Before you consider a capacity assessment, and when in the process of completing it, you have to take all practicable steps to support the person to make their own decisions.



You should not assume that because a person is 'going along' with an action that they consent to it.

If a person challenges an action, it is not refusal of consent if you have reasonable belief that they may lack capacity to consent.

The Five Principles

Underpinning the Act are five key principles which you must take into account when working with someone who may lack capacity:

Principle 1: The presumption of capacity - Everyone has the right to make their own decisions. Assume capacity unless proved otherwise. You cannot assume a person lacks capacity just because they have a particular medical condition or disability.

Principle 2: Individuals being supported to make their own decisions - A person must be given all practicable support to make the decision for themselves. If lack of capacity is established, it is still important that you involve the person in making decisions.

Principle 3: Unwise decisions - People have the right to make decisions that others might regard as unwise. Do not treat someone as lacking capacity for this reason; everyone has their own values, beliefs and preferences.

Principle 4: Best interests - Anything done for or on behalf of a person who lacks mental capacity must be done in their best interests.

Principle 5: Least restrictive option - To ensure that people who lack capacity are not restricted unnecessarily, consider whether the outcome could be achieved in a less restrictive way or whether there is a need to act at all when making a decision on their behalf.

You can find out more about each principle at www.scie.org.uk/mca/introduction/mental-capacity-act-2005-at-a-glance

How to assess mental capacity for a specific decision

The Act established a two stage test for the assessment.

Step one: Is there an impairment of, or disturbance in the functioning of a person's mind or brain?

Step two: Does the impairment or disturbance mean that the person is unable to make a specific decision at the material time?

When looking at the second step, assess if the person can:

- **Understand** the information about the decision to be made ;
- **Retain** that information in their mind ;
- **Use** or **Weigh** up that information as part of the decision-making process ; and
- **Communicate** their decision.

Record evidence for each of the above questions, quote the person, and avoid general phrases such as 'the person is confused'. In your conclusion, link the two stages by saying that you have reasonable belief that the person lacks capacity to make the specific decision at this particular time because of an impairment or disturbance in the functioning of their mind or brain.



Decisions made by the person in advance

Advance statements might contain general statements about a person's wishes and views for the future (for example, about the care they wish to receive, where they want to live, and who they want to be involved in decisions). This needs to be taken into account by the people who make decisions for the person.

Advance decisions relate to the right to refuse any treatments a person doesn't want in the future. An advance decision is binding if the person had the capacity to make the decision at the time it was made and they were at least 18 years old. The decision needs to be specific and relevant to the medical circumstances; refusal of basic care cannot be included. If the advance decision is to refuse life-sustaining treatment, it must be in writing, signed and witnessed.

Making decisions on behalf of the person

Lasting Power of Attorney (LPA) is a private legal document that enables someone (the donor) to appoint one or more persons, called Attorneys, to make decisions on their behalf. There are two types of LPA. An **LPA for property and financial affairs** allows Attorneys to make decisions about managing the donor's money and property. Depending on how this was set up, the donor can ask the Attorneys to use this LPA at any time. An **LPA for health and welfare** allows Attorneys to make decisions about a donor's personal healthcare, welfare and medical decisions. It can only be used once the donor has lost capacity to make the decisions themselves. Attorneys must make decisions in the best interests of the person. Attorneys have wide powers and are not usually supervised in their managing of the person's affairs.

Each LPA will be on a separate document and can contain specific limitations from the donor. The LPA must be registered with the Office of the Public Guardian (OPG).

Enduring Power of Attorney (EPA) can be used at any time with the donor's permission to help make or make decisions about someone's financial affairs. Only EPAs made and signed before 1st October 2007 can still be used. They must be registered with the OPG where the donor has lost capacity to manage their financial affairs.

A Deputy is someone who is appointed by the Court of Protection to handle the day to day running of the person's property and money. A Deputy can also be appointed to make health and welfare decisions on behalf of the person. A Deputyship will only be granted by the Court once the person has lost capacity to make those decisions themselves. The Deputy can only do what they are authorised to do by the Court.



How to check

- Read the Power of Attorney or Deputyship Order to see which decisions it covers.
- Check there is a stamp from the Office of Public Guardian or Court (Deputyship Order) to show it is registered.
- You can find out for free on the OPG website if someone has a registered Power of Attorney or is an appointed Deputy. Please visit: www.gov.uk/government/organisations/office-of-the-public-guardian

If there is no valid advance decision, Power of Attorney or Deputyship, follow the steps overleaf to make a best interests decision.

Next of Kin is not a legally recognised position. The people closest to a person who lacks capacity should be consulted but not be asked to consent to certain interventions, unless they have a legal basis to do so.



How to make a best interests decision for a person lacking capacity

Decisions on behalf of a person should always be considered on a case-by-case basis and must follow the best interests checklist in Section 4 of the Act.

Best interests checklist

- Take all practicable steps to support the person to participate.
- Identify all relevant circumstances in the individual case.
- Find out the person's past and present wishes, feelings, beliefs, values and any other factors they would be likely to consider if they had capacity, including any advance statements.
- Do not make assumptions based on the person's age, appearance, condition or behaviour.
- Assess whether the person might regain capacity and consider whether the decision can wait until then.
- If the decision concerns life-sustaining treatment, the best interests decision should not be motivated by the desire to bring about the person's death.
- Consult with others where it is practical and appropriate to do so. This includes anyone previously named as someone to be consulted; anyone caring for the person; close friends, relatives or others with an interest in the person's welfare; any Attorney and any Deputy appointed by the Court of Protection.
- Avoid restricting the person's rights by using the least restrictive option.
- Consider all of the above factors when you work out what is in the person's best interests.



Deprivation of Liberty Safeguards

A request for an authorisation under the Deprivation of Liberty Safeguards must be sent to the relevant Council (the local social services authority) where they are ordinarily resident.

A person may live in a care home in Council A but they are ordinarily resident in Council B. In this case, Council B is the one to which the DoLS request should be sent.

In 2014 the Supreme Court established a test to decide if a person is deprived of their liberty for the purposes of the safeguards. This is known as the 'acid test' and a person is deprived of their liberty if they are:

1. under continuous supervision and control;
2. not free to leave; and
3. they lack the capacity to consent to these arrangements.

If you have assessed the person as lacking capacity and they meet the 'acid test', then you have a duty to apply for a deprivation of liberty authorisation.

'Continuous' supervision does not have to mean every minute of every day. It is more about the overall effect on the person's life. If the care provider broadly knows where the person is at all times and what they are doing, then they are under constant supervision and control.

When deciding whether someone is free to leave, it is important not to confuse this with someone's ability to leave. The key question is: 'What would the carers do if the person wanted to leave?' If the answer is that the care provider would stop them, then they are not free to leave.

What happens next?

Some key people who will be involved are:

Managing Authority - the place where the person is deprived of their liberty (care or nursing home, hospice, hospital).

Supervisory Body - the Local Authority where the person is ordinarily resident.

Relevant Person's Representative (RPR) - a person who represents the individual for the duration of a DoLS authorisation.

Independent Mental Capacity Assessor (IMCA) - if there is no family member or friend available to support the person in the assessment or if a family member or friend needs support in the role of RPR, this professional will support and represent them in the decision-making process.

Best Interests Assessor - the professional who assesses whether or not the DoLS is in the person's best interests.

Mental Health Assessor - the medical professional who will provide the medical evidence for the person's impairment of the mind or brain.

You will be required to apply for the authorisation from the Local Authority. You can find more information about this, and the forms you will need to complete online at the following link:

www.gov.uk/government/publications/deprivation-of-liberty-safeguards-forms-and-guidance



You will need to demonstrate what the purpose of the authorisation for the deprivation of liberty is. You must also describe the restrictions you have put in place to monitor the person which have led you to conclude that they are deprived of their liberty.

The Supervisory Body will appoint a Best Interest Assessor and a Mental Health Assessor who will both visit the person at the hospital or care home.

The Best Interest Assessor establishes:

1. that the person is 18 years or older (**Age Assessment**);
2. that an authorisation to deprive the person of their liberty will not conflict with any existing decision making authority for the person, for example, an advance decision to refuse treatment (**No Refusals Assessment**); and
3. if the circumstances amount to a deprivation of liberty and if they are in the person's best interests, needed to prevent harm, and a proportionate response to the likelihood and seriousness of the harm (**Best Interest Assessment**).

The Mental Health Assessor establishes:

1. that the person has an impairment, or disturbance, of the mind or brain (**Mental Health Assessment**);
2. that the person is eligible for detention under the Mental Capacity Act rather than the Mental Health Act (**Eligibility Assessment**); and
3. that the person lacks capacity to make the decision (**Mental Capacity Assessment**).

If the person fulfils the above criteria, then the Local Authority will grant a standard authorisation which will not be for a period of more than **12 months**.

A Relevant Person's Representative (RPR) is appointed by the Local Authority after the standard authorisation is granted. Their role is to:

1. Maintain face-to-face contact with the person during the authorisation.
2. Represent and support the person in all matters relating to the DoLS.
3. Request a review of the authorisation if in any doubt about the criteria still being met.
4. Ensure that the authorisation is never used for the convenience of professionals, carers or anyone else, or as a form of punishment for the person.
5. Help the person use their right to appeal the authorisation to the Court of Protection (based on the person's wishes or on a best interests decision by the RPR).

The RPR can be a family member, friend, or an Independent Mental Capacity Advocate (IMCA) who is employed by an advocacy agency.





As the Registered Manager you are required to:

- Consider if a DoLS is needed for every new admission.
- Send in a fully completed DoLS request form when all the criteria are met.
- Inform the Supervisory Body about any significant change in circumstances. For example: the person moving, regaining capacity, objecting to elements of their care, restrictions significantly changing, or family objections.
- Consult with the person and their relatives/friends before you apply.
- Have all paperwork ready for the Mental Health and Best Interest Assessors.
- Ensure all staff know about the Mental Capacity Act and DoLS and understand how to uphold the legal rights of the people using the service.
- Have a documented Mental Capacity Act and DoLS policy and procedure.
- Ensure that the DoLS assessments and authorisation form part of the person's care plan and that the DoLS and its conditions are part of the monthly care plan review.
- Adhere to conditions and feed back to the Supervisory Body any difficulty complying with conditions.
- Involve family RPRs or paid RPRs in decisions relating to the DoLS.
- Work with the person, their family or other representatives throughout the DoLS authorisation and make sure they know their right to request a review or to appeal at any time.
- Notify the Care Quality Commission when an authorisation is granted or not granted.
- Request a further authorisation up to 28 days before the DoLS expires if required.

Restraint

The Act allows restrictions and restraint to be used in an incapacitated person's support, but **only if it is in their best interests**. This is the first test which needs to be satisfied in order to protect carers from liability.

Restraint in the Mental Capacity Act is defined as:

- Using force, or threatening to use force, to make someone do something that they are resisting, or
- Restricting a person's freedom of movement, whether they are resisting or not.

Restraint can be through verbal, physical or chemical means, or by locking a door. It can even be hypothetical: what would you do if the person moved towards the door?

The Act protects you from liability when using restraint if two more conditions are met:

- You have a belief that the restraint is necessary to prevent harm to the person and no less restrictive option is available.
- The amount or type of restraint is a reasonable response to the likelihood and seriousness of the harm.



Covert medication

Covert medication interferes with an individual's right to private life and contributes to a deprivation of liberty where the medication affects the person's mood and behaviour or acts as a sedative. Covert medication must be limited to exceptional circumstances, with safeguards (such as regular reviews) in place.

You should not administer medication to a resident without their knowledge if the resident has capacity to make decisions about their treatment and care.

If a resident is refusing medication that is essential to maintaining their health and well-being, a formal assessment of their capacity to make this decision must be completed. If the outcome of the assessment is that the person lacks the required capacity, then a multi-disciplinary best interests decision meeting should take place with the pharmacist, prescriber, the person and any representative (such as family member, or RPR).

If it is agreed that administering the medication covertly is in the person's best interests, this must be formally recorded in the person's records and a care management plan must be devised which specifies timeframes and the circumstances that will trigger a review. Less restrictive options need to be considered. If it cannot be agreed that covert administration of medication is in the person's best interests, an application to the Court of Protection should be made.

The National Institute for Health and Care Excellence (NICE) has produced guidelines on medicine management in care homes, which includes covert medication. See www.nice.org.uk for more information.

Decisions of varying complexity

A person may have capacity to make simple decisions but not more complex or serious decisions. You will undertake some capacity assessments informally on a day-to-day basis when providing care to a person. For serious / complex decisions you should always make a formal record of your assessment. Reflect on what assessments and decisions to record formally.

With all decisions made in a person's best interests, you must be able to provide evidence and a rationale that:

- there was a reasonable belief that the person lacks capacity ;
- how you have supported the person with making the decision, taking into account their needs ;
- how you have applied the best interests principle ; and
- how you have actively looked for a less restrictive option.

Some decisions, such as whether the person wishes to challenge their DoLS authorisation, require an application to the Court of Protection.

West Sussex County Council offers training on the Mental Capacity Act and the Deprivation of Liberty Safeguards for anyone working in social care or health who works with people aged 16 years and over.

More information can be found on the Learning and Development Gateway at www.westsussexcpd.co.uk



If you have a query relating to the Deprivation of Liberty Safeguards, contact the Deprivation of Liberty Safeguards (DoLS) Team.

Phone: 033 022 23691

Email: dols@westsussex.gov.uk



Deprivation of Liberty Safeguards (DoLS) team

Adults' CarePoint

- Phone: **01243 642121**
- NGT Text Relay: **18001 01243 642121**
(available on tablets and smartphones if you download the app)
- Email: **socialcare@westsussex.gov.uk**
- Website: **www.westsussex.gov.uk/
social-care-and-health**
- Write to: **Second Floor, The Grange
County Hall, Chichester
West Sussex PO19 1RG**

Other formats

If you would like more copies of this booklet or you need this information in another format, for example, on audio CD, in an easy read format or in another language, please contact us, using the contacts details above.

www.westsussex.gov.uk