group policies and procedures

# Mental Capacity & Liberty Protection POLICY

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| Category | Clinical |
| Author | Castleman Healthcare Ltd |
| Responsible Director | Fiona Pickering |
| Date of issue | September 2021 |
| Next review date | September 2025 |
| Document ref & version | Mental Capacity & Liberty Protection Policy V1 |

**Related policies and guidance**

**Document revision and approval history**

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| --- | --- | --- | --- | --- |
| Version | Date | Author | Approved by | Comments |
| V1 | Sep 2021 | FP |  |  |
|  | Sep 2023 |  |  | Reviewed FP |
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# INTRODUCTION

The **Mental Capacity Act** 2005 applies to those who make decisions or deal with persons who may lack mental capacity. Within primary care in England the provisions will apply to GPs, nurses and those to whom a referral may be made.

Capacity in this context is the ability to reach a decision and the lack of this capacity may be on either a temporary or a permanent basis, due to physical as well as mental causes.

The Mental Capacity Act does not generally apply to young persons under the age of 16 – a parent or guardian can normally make decisions on their behalf – however under some circumstances a Court of Protection may make decisions on their behalf.

# THERE ARE FIVE CORE PRINCIPLES OF THE ACT

1. A person is assumed to have capacity until it is proven otherwise.
2. A person is not to be treated as unable to make a decision unless all practicable steps have been taken to help them do so, without success.
3. A person is not to be treated as unable to make a decision merely because they have made an unwise decision.
4. An act done for, or a decision made on behalf of, a person who lacks capacity must be in that person's best interests.
5. Prior to an act or a decision under the act, due regard must be taken to whether the purpose for which the decision is needed can be effectively achieved in a way which is less restrictive of the individual’s rights or freedom of action.

**Recording**

In normal consultations there is the assumption of capacity unless there is evidence to suggest that this may be in doubt. This may arise from behaviour or concerns raised by others such as family members. Clinical staff will, in the normal course of care, make decisions regarding capacity and the patient’s ability to consent to the treatment proposed.

All clinicians will maintain a record within the clinical system of long-term or significant plans, decisions or considerations made in respect of a patient’s capacity.

When making a record relating to capacity the record will include as a minimum:

* Why a particular decision has been made.
* What information was used in arriving at the decision.
* A record or copy of the information used.
* What the decision was (or the outcome).
* What the process was in arriving at the decision - other staff involved, consultations, family involvement, referrals, etc.

The purpose of a full record and audit trail relating to both the individual decision and the full cycle of care may be required if the clinician needs in the future to justify the processes or the action taken.

**Assessing Capacity**

It is not within the scope of this policy document to provide full clinical guidance on the assessment of capacity. The following general considerations will be applied:

The Official Code of Practice (see Resources) provides for a two-stage question test:

1. Is there an impairment of, or disturbance in, the functioning of the person’s mind or brain?
2. If so, is the impairment or disturbance sufficient that the person lacks the capacity to make that particular decision?

***This test must be used,*** ***and the records must record this and the response***.

**Consideration must be given to:**

* Whether they are able to understand the information given to them.
* Whether they are able to retain this information.
* Whether they are able to assess this information whilst reaching a decision.
* Whether they are able to communicate their decision using any effective means.

Where the person is unable to do ***any one*** of the above they are unable to make the decision themselves.

**In addition, the company will:**

* Provide all necessary information, including the consequences of making or not making a decision.
* Provide information on all available options.
* Consult with family members.
* Take into account ethnic cultural and personal preferences where known.
* Select location carefully, with consideration for the patient, to ensure that the patient is at ease and comfortable in the surroundings.
* Pitch the consultation to the needs and level which suit the patient best.
* Assess the patient at their best level of functioning.

**The company will also consider:**

* Intellectual ability.
* Memory.
* Attention/concentration.
* Reasoning.
* Understanding.
* Ability to communicate.

The Code of Practice also provides a further 6 questions to aid in the assessment process:

* Does the person have a general understanding of what decision they need to make and why they need to make it?
* Do they understand the consequences of making or not making the decision, or of deciding one way or the other?
* Are they able to understand the information relevant to the decision?
* Can they weigh up the relative importance of the information?
* Can they use and retain the information as part of the decision making process?
* Can they communicate the decision?

See Appendix B for a checklist.

Or Visit<https://www.bma.org.uk/advice-and-support/ethics/adults-who-lack-capacity/mental-capacity-act-toolkit> for the BMA’s Mental Capacity Tool Kit.

# PRINCIPLES OF BEST INTEREST

“Best interest” is not defined. Avoid making assumptions of best interest based on age, appearance, behaviour etc. and consider their wishes and feelings. It is also important to take into account any written instructions which exist already (Advance Directives).

Take the views of family and carers and involve the person where possible. Assess whether the decision can be deferred if the person is likely to regain capacity.

Document your assessment processes and reasons. Consider taking the least restrictive alternative.

**Advance Directives**

These enable an adult with capacity to make provision for a time when they may lose capacity. An Advance Directive properly drawn up is as valid as a current decision. If an Advance Directive involves the refusal of life-sustaining treatment it must be made in writing and be signed and witnessed, however in other circumstances directives may be verbal and recorded / written down.   
  
See also Advance Directives [\*].

A Lasting Power of Attorney will overrule an Advance Directive if made after and gives an attorney the right to consent or refuse treatment. An Advance Directive decision will also be withdrawn if the person subsequently did something inconsistent with it.

See also Powers of Attorney [\*].

**Independent Mental Capacity Advocates (IMCA)**

The IMCA is an independent service which provides safeguards for those people who lack capacity but have no-one else to make decisions for them or support them (other than paid persons).

An IMCA mustbe instructed and consulted, for people lacking capacity who have no-one else to support them whenever:

* an NHS body is proposing to provide serious medical treatment, or
* an NHS body or local authority is proposing to arrange accommodation (or a change of accommodation) in hospital or a care home and
* the person will stay in hospital longer than 28 days, or
* they will stay in the care home for more than eight weeks.

An IMCA maybe instructed to support someone who lacks capacity to make decisions concerning:

* care reviews, where no-one else is available to be consulted
* adult protection cases, whether or not family, friends or others are involved

The IMCA service is available in England and Wales.

In England the service is delivered through local authorities, who work in partnership with NHS organisations. In Wales the National Assembly for Wales delivers the service through local health boards.

Local authorities or NHS organisations are responsible for instructing an IMCA to represent a person who lacks capacity. In these circumstances they are called the ‘responsible body’.

For decisions about serious medical treatment, the responsible body will be the NHS organisation providing the person’s healthcare or treatment. Examples of serious treatment (amongst others) may be:

* chemotherapy and surgery for cancer.
* electro-convulsive therapy.
* therapeutic sterilization.
* major surgery (such as open-heart surgery or brain/neurosurgery).
* 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.

For decisions about admission to accommodation in hospital for 28 days or more, the responsible body will be the NHS body that manages the hospital.

Staff in the NHS, for example doctors or consultants (the “decision makers”) all have a duty, under the Mental Capacity Act, to instruct an IMCA where the eligibility criteria are met. This duty started, in England, on 1st April 2007 and in Wales on 1st October 2007.

The “decision-maker” is the person who is proposing to take an action in relation to the care or treatment of an adult who lacks capacity, or who is contemplating making a decision on behalf of that person. Who the decision maker is will depend on the person’s circumstances and the type of decision. For example, the decision-maker may be a care manager or a hospital consultant. Staff working in statutory organisations, in the local authority or NHS, who are involved in making best interests decisions should know when a person has a right to IMCA and when they have a duty to instruct an IMCA. This duty may fall on GPs from time to time.

Practices are recommended to research the local method of referral to IMCA through the Patient Advice and Liaison Service (PALS) operating within their PCT area.

**RESOURCES**

[NHS - Mental Capacity Act](https://www.nhs.uk/conditions/social-care-and-support-guide/making-decisions-for-someone-else/mental-capacity-act/)

[Rethink - Mental capacity and mental illness](https://www.rethink.org/advice-and-information/rights-restrictions/mental-health-laws/mental-capacity-and-mental-illness/?gclid=EAIaIQobChMIvvKlw_Sh8wIVUOrtCh32eA1UEAAYASAAEgLr9PD_BwE)

[Mental Capacity Act 2005](https://www.legislation.gov.uk/ukpga/2005/9/contents)

# DEPRIVATION OF LIBERTY STANDARDS POLICY

**What are they?**

The Deprivation of Liberty Safeguards 2009 are an amendment to the Mental Capacity Act 2005. They provide a legal framework to protect those over 18 years who lack the capacity to consent to the arrangements for their treatment or care.

Lack of capacity may be, for example, by reason of dementia, learning disability or brain injury. Affected persons may require restriction or restraint in the delivery of treatment or care, in order to protect that person or their carers from risk or harm. Where the levels of restriction or restraint are extensive, they could potentially be depriving that person of their liberty.

Deprivation of Liberty Safeguards go beyond the actions permitted under section five of the Mental Capacity Act (MCA) 2005.

**Who do they apply to?**

The safeguards only apply to people who:

* Lack capacity to consent to care/treatment they receive.
* Are over 18 years of age.
* Receive care in a hospital or a care home setting and the care they receive deprives them of their liberty.
* Are not detained under the Mental Health Act.

If a person is being deprived of their liberty and they are not in a care home or hospital, their care can only be authorised through the Court of Protection.

**What do you need to know?**

* Sometimes deprivation of liberty is required to provide care and treatment and to protect people from harm, but every effort should be made to prevent deprivation of liberty by making provision to avoid placing restrictions.
* If deprivation of liberty cannot be avoided, it should be for no longer than is necessary.
* Where the Safeguards apply, there is a legal duty on the hospital or care home to request that the commissioner of care, or local authority, authorise the depriving of someone’s liberty for a limited period of time.
* A major part of preventing deprivation of liberty is minimising any restraint. Restraint must be appropriate, proportionate and in the patient’s best interests.
* The Care Quality Commission must be notified of any applications to deprive someone of their liberty, and what the outcome was.

**What to do**

* If worried about a patient in your care, or under the care of someone registered with the practice who you think might be being deprived of their liberty, consider ways in which restrictions could be minimised.
* It is important to act quickly in order to comply with legislation.
* Discuss the case with the adult safeguarding lead(s).

**Safeguarding Contacts**

**Adults**

BCP Adults Safeguarding team – 01202 123654

BCP Out of Hours – 01202 657279

Dorset Adults – 01929 557712

Dorset Out of Hours – 01305 858250

**Children**

BCP Children’s Safeguarding team – 01202 123334

BCP Out of Hours – 01202 738256

Dorset Children’s Safeguarding team - 01305 228558

Dorset Out of Hours – 01202 228866

**In a serious emergency call 999**