

## **Purpose**

To meet the provisions of the Mental Capacity Act 2005

## **Scope**

All Customers who lack mental capacity as defined under the Act

## **Policy**

All Customers assessed as lacking mental capacity will be subject to the provisions of the Act

## **Mental Capacity Act 2005 – Summary**

The Mental Capacity Act came into force in April 2007 and was implemented in October 2007. The Mental Capacity Act was substantially amended by the Mental Health Act 2007 to provide for a procedure to authorise the deprivation of a mentally incapacitated person. This part of the Act is called the Deprivation of Liberty Safeguards (DOLS).

The Mental Capacity Act 2005 provides a statutory framework to empower and protect vulnerable people who are not able to make their own decisions. It makes it clear who can take decisions, in which situations, and how they should go about this. It enables people to plan ahead for a time when they may lose capacity. Guidance on the Act is provided in a Code of Practice. Everyone caring for, or working with an adult who may lack capacity to make specific decisions must comply with this Act.

There is a Code of Practice which provides guidance and information as to how the Act works. The whole Act is underpinned by a set of five key principles:

- A presumption of capacity – every adult has the right to make his or her own decisions and must be assumed to have the capacity to do so unless proved otherwise
- The right for individuals to be supported to make their own decisions – people must be given all appropriate help before anyone concludes that they cannot make their own decisions
- That individuals must retain the right to make what might be seen as eccentric or unwise decisions
- Best interests – anything done for or on behalf of people without capacity must be in their best interests
- Least restrictive intervention – anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms

## **What does the Act do?**

The Act enshrines in statute best practice and common law principles concerning people who lack mental capacity and those who take decisions on their behalf. It replaced previous statutory schemes for ensuring powers of attorney and Court of Protection receivers with reformed and updated schemes.

## **Assessing lack of capacity**

The Act sets out a single clear test for assessing whether a person lacks capacity to take a particular decision at a particular time. It is a 'decision-specific' test. No one can be labelled 'incapable' as a result of a particular medical condition or diagnosis. Section 2 of the Act makes it clear that a lack of capacity cannot be established merely by reference to a person's age, appearance or any condition or aspect of a person's behaviour which might lead others to unjustified assumptions about capacity.

## **Best Interests**

Everything that is done for or on behalf of a person who lacks mental capacity must be in that person's best interest. The Act provides a checklist of factors that decision-makers must work through in deciding what is in a person's best interest. A person can put his/her wishes and feelings into a written statement if they so wish, which the person making the determination must consider. Also, carers and family members gain a right to be consulted.

## **Acts in connection with care or treatment**

Section 5 clarifies that, where a person is providing care or treatment for someone who lacks capacity, then that person can provide the care without incurring legal liability. The key will be proper assessment of capacity and best interest. This will cover actions that would otherwise result in a civil wrong or crime if someone has to interfere with the person's body or property in the ordinary course of caring. For example, by giving an injection or by using the persons' money to buy things for them.

## **Restraint/deprivation of liberty**

Section 6 of the Act defines restraint as the use or threat of force where an incapacitated person resists, and any restriction of liberty or movement whether or not the person resists. Restraint is only permitted if the person using it reasonably believes it is necessary to prevent harm to the incapacitated person, and if the restraint used is proportionate<sup>4</sup> to the likelihood and seriousness of harm.

Section 4A prohibits the deprivation of the liberty of the person unless deprivation is authorised by the Deprivation of Liberty safeguards in Part 2 of the Mental Capacity Act. Where a person may be being accommodated in circumstances that amount to a deprivation of liberty, authorisation under the DOLS arrangements should be sought.

The Act deals with two situations whereby a designated decision-maker can act on behalf of someone who lacks capacity:

- I. Lasting powers of attorney (LPAs) – The Act allows a person to appoint an attorney to act on their behalf if they should lose capacity in the future. This is like the previous Enduring Power of Attorney (EPA) but the Act also allows people to let an attorney make health and welfare decisions.
- II. Court appointed deputies – The Act provides for a system of court appointed deputies to replace the previous system of receivership in the Court of Protection. Deputies are able to take decisions on welfare, healthcare and financial matters as authorised by the court but are not able to refuse consent to life-sustaining treatment. They are only appointed if the court cannot make a one off decision to resolve the issues.

The Act created two new public bodies to support the statutory framework, both of which are designed around the needs of those who lack capacity:

- I. A new Court of Protection – The new court will have jurisdiction relating to the whole Act and is the final arbiter for capacity matters. It has its own procedures and nominated judges.
- II. A new Public Guardian – The Public Guardian and his/her staff is the registered authority for LPAs and deputies. They supervise deputies appointed by the Court and provide information to help the Court make decisions. They also work together with other agencies such as the police and social services to respond to any concerns raised about the way in which an attorney or deputy is operating.

The Act also includes three further key provisions to protect vulnerable people:

- I. Independent Mental Capacity Advocate (IMCA). An IMCA is someone appointed to support a person who lacks capacity but has no one to speak for them. The IMCA makes representations about the person's wishes, feelings, beliefs and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision.
- II. Advance decisions to refuse treatment – Statutory rules with clear safeguards confirm that people may make a decision in advance to refuse treatment if they should lose capacity in the future. It is made clear in the Act that an advance decision will have no application to any treatment which a Doctor considers necessary to sustain life unless strict formalities have been complied with. These formalities are that the decision must be in writing, signed and witnessed. In addition, there must be an express statement that the decision stands 'even if life is at risk'.
- III. A criminal offence – The Act introduces a new criminal offence of ill treatment or neglect of a person who lacks capacity. A person found guilty of such an offence may be liable to imprisonment for a term of up to five years.

## Summary

These safeguards apply to people who have a mental disorder and lack capacity to consent to arrangements made for their care or treatment, and that care or treatment is being provided in a way that amounts to a deprivation of liberty. This applies to people living in a hospital or care home. Hospitals and care homes will need to be aware of the distinction between mere restrictions and deprivation of liberty.

A person can only be deprived of their liberty if it:

- Is in their best interests to protect them from harm
- It is a proportionate response
- There is no less restrictive alternative

## How can a DOL be authorised?

A managing authority has responsibility for applying for an authorisation (for a hospital this is the NHS body responsible for running the hospital, for a care home, this will be the person registered as a service provider under the Health and Social care Act 2008 in respect of the regulated activity). A supervisory body is responsible for considering the request, commissioning six statutory assessments, and if appropriate authorizing the DOL. Where the DOL concerns someone in a NHS hospital that body shall be the PCT, or where the person is in a care home, the body shall be the local authority in which the person is ordinarily resident. The supervisory body is responsible for ensuring sufficient assessors are available to meet their needs.

The 6 statutory assessments to be undertaken before a DOL can be authorized are as follows:

- Age assessment;
- No refusals;
- Mental capacity assessment;
- Eligibility assessment;
- Best interest assessment.

## Procedure

Maintain awareness of the Mental Capacity Act and the DOLS. The full Act can be found here:

