

# THE MENTAL CAPACITY ACT 2005

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WHAT IT MEANS WHEN A YOUNG PERSON WITH DISABILITIES TURNS 16

# CONSIDER A YOUNG PERSON WITHOUT DISABILITIES

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- <https://www.lawble.co.uk/16-year-old-rights-against-parents/#:~:text=Your%20parents%20or%20carers%20are,legally%20responsible%20for%20your%20wellfare>
- At 16, a non-disabled young person has more rights and is at a point where they are exploring the concept of being an adult and taking risks, which is part of how they learn and grow.
- For a young person with disabilities, they may or may not want to also explore the concept of being an adult and take risks, which is part of how they learn and grow, but due to their disabilities, they may not have the cognitive abilities to make fully-informed decisions nor understand the risks or potential consequences of specific decisions they make.
- The Mental Capacity Act 2005 applies to anyone over the age of 16 and must be adhered to when decisions are being made on behalf of the young person.

# THE MENTAL CAPACITY ACT PRINCIPLES

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- Principle 1: Assume a person has capacity unless proved otherwise.
- Principle 2: Do not treat people as incapable of making a decision unless all practicable steps have been tried to help them.
- Principle 3: A person should not be treated as incapable of making a decision because their decision may seem unwise.
- Principle 4: Always do things or take decisions for people without capacity in their best interests.
- Principle 5: Before doing something to someone or making a decision on their behalf, consider whether the outcome could be achieved in a less restrictive way.

# WHAT SORTS OF DECISIONS MAY NEED TO BE MADE

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- N.B. It is unlawful to deem someone to lack capacity generally. Assessment of a person's capacity is specific to the decision that needs to be made at the time.
- Post-16 education
- Medical treatments and procedures, covert medication
- Management of the young person's property and finances
- Social care provision
- Accommodation
- Contact/relationships with others



# INDICATORS THAT A MENTAL CAPACITY ASSESSMENT MAY BE REQUIRED

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- If any of the following indicators are present the person may *not* be able to make their own decision.
  1. Lacking a general understanding of the decision that needs to be made, and why it needs to be made;
  2. Lacking a general understanding of the likely consequences of making, or not making the decision;
  3. Being unable to understand, remember and use the information provided to them when making the decision; and
  4. Being unable to, or unable to consistently communicate the decision.
- There may also be cause for concern if someone:
  1. Repeatedly makes an unwise decision that puts them at serious risk of harm, abuse or exploitation; or
  2. Makes a particular unwise decision that is obviously irrational or out of character.

([https://www.proceduresonline.com/resources/mentalcapacity/p\\_ment\\_cap\\_assess.html](https://www.proceduresonline.com/resources/mentalcapacity/p_ment_cap_assess.html))



# WHEN A MENTAL CAPACITY ASSESSMENT MUST BE CARRIED OUT

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- A mental capacity assessment must be carried out when:
  1. There are indicators that the person may not be able to make the decision at the time that it needs to be made; and
  2. There is evidence that the person has (or may have) an impairment of, or disturbance in the functioning of the mind or brain; and
  3. The reason that the person may not be able to make the decision is related to (or may be related to) the impairment in, or disturbance of the functioning of the mind or brain.

# DECIDING WHO SHOULD ASSESS MENTAL CAPACITY

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- The person who assesses mental capacity should be the person who is either:
  1. Involved in supporting the person at the time that the decision needs to be made; or
  2. The person with responsibility for making a decision if the person is unable to do so.
- In all cases the person assessing capacity must understand the decision to be made and be able to provide all of the relevant information to be able to assess the person's ability to make the decision for themselves.

# EXAMPLES

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1. A carer or support worker may assess the person's capacity to choose whether to have a bath or what to eat;
  2. A district nurse may assess their capacity to consent to having a dressing changed;
  3. A dentist may assess their capacity to consent to having a filling;
  4. A GP may assess their capacity to take a certain medication;
  5. A donee for lasting power of attorney may assess their capacity to manage finances;
  6. A social worker may assess their ability to make a decision where to reside;
  7. An Occupational Therapist may assess their ability to use a specific piece of equipment safely;
  8. A consultant may assess their ability to consent to major surgery.
- If the decision relates to a legal transaction, it is the responsibility of a solicitor or legal practitioner to assess capacity.



# THE TWO-STAGE TEST (THE DIAGNOSTIC TEST)

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- 1) Does the person have an impairment of their mind or brain, whether as a result of an illness, or external factors such as alcohol or drug use?
- 2) Does the impairment mean the person is unable to make a specific decision when they need to?
- If stage 1 concludes that there is an impairment of, or disturbance in the functioning of the mind or brain you must move onto stage 2.
- If stage 1 concludes that there is no impairment or disturbance you should:
  1. **Not** apply stage 2; and
  2. Deem the person to have capacity to make the decision; and
  3. Allow them to make their own decision; by
  4. Providing support as practicable to enable them to do so.

# THE FOUR-STAGE TEST (FUNCTIONAL TEST)

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- The functional test consists of 4 elements, each of which you must test the person's ability in. They are:
  1. The ability to understand information about the decision (the 'relevant' information);
  2. The ability to retain the information long enough to make the decision;
  3. The ability to use, or 'weigh up' the information as part of the decision making process; and
  4. The ability to communicate their decision through any means.
- In order to make their own decision the person must be able to demonstrate their ability in *all* of the areas of the functional test.

# SECTION 4 MENTAL CAPACITY ACT: THE BEST INTERESTS CHECKLIST

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- **Encourage participation of the person**
  - You should do whatever is reasonably possible to permit and encourage the person who lacks capacity to take part, or to improve their ability to take part in making the decision.
- **Identify all relevant circumstances**
  - You should try to identify all of the things that the person who lacks capacity would take into account if they were making the decision for themselves.
- **Find out the person's views**
  - You should try to find out the views of the person who lacks capacity, including:
    1. Their past wishes and feelings about the matter to be decided;
    2. Their present wishes and feelings about the matter to be decided;
    3. Any beliefs or values that would be likely to influence the decision in question (for example religious, cultural, moral or political beliefs); and
    4. Any other factors that the person would be likely to consider if they were making the decision or acting for themselves.

# THE BEST INTERESTS CHECKLIST, CONTD

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- **Avoid discrimination**
- You must not make assumptions about someone's Best Interests based solely on the young person's age, appearance, behaviour or physical/mental health condition
- **Assess whether the person might regain capacity**
- You should consider whether the person is likely to regain capacity and, if so whether the decision can be delayed.



# CONSULTING OTHERS

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- An important part of making a decision in someone's best interests is to, if it is practical and appropriate to do so, consult the following people:
  1. Anyone who the person has asked you to consult with;
  2. Anyone previously named by the person as someone to be consulted on either the decision in question or on similar issues;
  3. Anyone engaged in caring for the person (paid or unpaid);
  4. *Close relatives, friends or others who take an interest in the person's welfare;*
  5. Any donee of a Lasting Power of Attorney; or
  6. Any Deputy appointed by the Court of Protection.
- If there is a particular person that the incapacitated person has asked you not to consult with then you should not consult with that person.

# BEST INTERESTS CHECKLIST, CONTD

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- **Consulting an IMCA**

- An independent mental capacity advocate (IMCA) **must** be consulted when:
  1. The decision relates to major medical treatment; or
  2. The decision relates to where the person should live; and
  3. There is no-one who fits any of the above categories; or
  4. There is evidence that someone in the above category is not appropriate to be consulted.

- **Avoid restricting the person's rights**

- You should ensure that a range of options are explored, to identify which is least restrictive of the person's rights.

# OBTAINING LEGAL AUTHORITY FOR YOUR ADULT CHILD

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- If a person has capacity to make the decision, they can apply to make someone they trust a donee of Lasting Power of Attorney to act on their behalf when they lose mental capacity, for Property and Finance and/or Health and Welfare.
- <https://www.gov.uk/power-of-attorney>
- If a person lacks mental capacity to make decisions about their property and finances and/or their health and welfare, you can apply to become a Deputy for them, which would give you legal authority as decision-maker for relevant decisions but also responsibilities under the MCA 2005 Code of Practice.
- <https://www.gov.uk/become-deputy>

# DEPRIVATION OF LIBERTY SAFEGUARDS

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- The Mental Capacity Act **Deprivation of Liberty Safeguards** (MCA **DoLS**), which came into force on 1 April **2009**, provide a legal framework to ensure people are **deprived** of their **liberty** only when there is no other way to care for them or safely provide treatment.
- The Article 5 right to Liberty is a conditional right, rather than an absolute right, which means that it can be breached if there is a legal process that justifies this, I.E the breach of someone's right to liberty and freedom of movement is independently scrutinised and deemed as necessary and proportionate in the context of their care needs.



# IDENTIFYING A DEPRIVATION OF LIBERTY

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- **The ACID TEST:**

**Objective element:** Is the person under continuous supervision and control and not free to leave?

*Continuous supervision* – does a carer/responsible adult always need to be aware of the person's whereabouts?

*Continuous control* – does the carer/responsible adult ensure all of the person's daily care needs are met, even if simply through prompting or arranging activities/appointments for them

*Not free to leave* – physical ability to leave is irrelevant. If the person did manage to leave (asking a friend to remove them), would efforts be made to intervene and return the person to the place where they are cared-for?

**Subjective element:** Does the person lack mental capacity to give valid consent for their care and accommodation?

**Imputability to the State:** If the State is aware or ought to be aware of the deprivation of someone's liberty, they are responsible for seeking legal authorisation for this if in the person's best interests or raising a safeguarding concern if the deprivation is deemed not in the person's best interests and is unlawful.



# 2014 CHESHIRE WEST JUDGEMENT

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- Before 2014, 'Deprivation of Liberty' only applied to care homes and hospitals and the DoLS procedure was written into Law that care home and hospital managers would apply to 'Supervisory Bodies' (currently the local authority) to request an independent Best Interests Assessment to authorise the Deprivation of a person's liberty when they lacked mental capacity to consent to their care and accommodation.
- In 2014, the law changed. 'A gilded cage is still a cage'. This meant that, a person could be deprived of their liberty in any setting, including at home with their families. To uphold the individual's human right, it became law that independent scrutiny was needed to ensure that the restrictions that a person was subject to were necessary, proportionate, the least restrictive way of meeting their needs and in their best interests.
- Settings other than care homes and hospitals were not covered by the DoLS procedure written into the Mental Capacity Act 2005 so the only way to make a Deprivation of Liberty lawful is to apply to the Court of Protection.

# PRIORITISING DEPRIVATION OF LIBERTY APPLICATIONS

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- With the implementation of DoLS in 2009 and then with the change in law to cover all settings in 2014, there is a huge volume of people with disabilities who are deprived of their liberty for the purpose of receiving care and treatment.
- All local authorities are working to obtain legal authorisation for these deprivations of liberty but have to prioritise cases where the person is more at risk, more severely restricted or there are objections as to whether the deprivation is indeed in the person's best interests. So families may ask the question 'why has this not happened before?' – the reason is that social work teams would have had to prioritise others beforehand.

# DEPRIVATION OF LIBERTY OF 16/17-YEAR-OLDS AND PARENTAL RESPONSIBILITY

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- Parental responsibility can be used for consent for certain decisions for 16/17-year-olds if this is in line with the young person's wishes and feelings. However, in September 2019, the Court of Protection confirmed that parental responsibility cannot be relied upon as legal authority to authorise a deprivation of the 16-17-year-old's liberty. The only way to make this deprivation lawful is to apply to the Court of Protection.
- See article: <https://www.magdalenchambers.co.uk/parental-consent-and-the-deprivation-of-liberty-of-16-and-17-year-old-children/>



# ADDITIONAL RESOURCES

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- Mencap MCA Resource Pack: [https://www.mencap.org.uk/sites/default/files/2016-06/mental%20capacity%20act%20resource%20pack\\_1.pdf](https://www.mencap.org.uk/sites/default/files/2016-06/mental%20capacity%20act%20resource%20pack_1.pdf)
- BILD MCA Resource Pack: <https://www.scie.org.uk/files/mca/directory/bild-mca.pdf?res=true>
- Deprivation of Liberty for Under 16s: <https://www.communitycare.co.uk/2016/07/14/guide-law-deprivation-liberty-children/>
- Quick guide to Community DoLS orders: <https://www.adass.org.uk/media/5895/quick-guide-to-deprivation-of-liberty-orders.pdf>
- MCA 2005 code of practice: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/921428/Mental-capacity-act-code-of-practice.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921428/Mental-capacity-act-code-of-practice.pdf)