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Social Care **Wales**

# The Mental Capacity Act and Deprivation of Liberty Safeguards (DoLS)

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What you need to understand about the Mental Capacity Act and Deprivation of Liberty Safeguards (DoLS) and how they apply to you.

## What is the Mental Capacity Act?

[The Mental Capacity Act 2005](#) (MCA) has been in force since 2007 and applies to England and Wales.

The main purpose of the MCA is to promote and safeguard decision-making within a legal framework.

It does this in two ways:

- by empowering people to make decisions for themselves wherever possible, and by protecting people who lack capacity by providing a flexible framework that places individuals at the heart of the decision-making process
- by allowing people to plan ahead for a time in the future when they might lack the capacity

It enshrines in law five principles:

1. Assume a person has capacity unless proved otherwise
2. Do not treat people as incapable of making a decision unless all practicable steps have been tried to help them
3. A person should not be treated as incapable of making a decision because their decision may seem unwise
4. Always do things or take decisions for people without capacity in their best interests
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 does mental capacity mean?

Imagine if your consultant had advised you to have a total knee replacement.

- Do you have to have it?
- If not, why not?

The answer is no, you don't have to have the operation if you've got capacity to make that decision.

To demonstrate our mental capacity we must:

- Understand information relevant to the decision
- Retain that information for the length of time needed to make that decision
- Weigh up that information
- Communicate the decision

Therefore, if you explained to the doctor your reasons for refusing the operation, demonstrating that you have understood his advice and used that information to make your decision, he cannot force you to have it.

Where there is doubt as to a person's ability to make their own decisions, whether that be around what to wear, or where to live, the Mental Capacity Act (2005) might apply.

## How do we know if a person with dementia has mental capacity?

To decide whether an individual has the capacity to make a particular decision you must answer two questions:

- Stage 1. Is there an impairment of or disturbance how a person's mind or brain functions? If so
- Stage 2. Is the impairment or disturbance sufficient that the person lacks the capacity to make a particular decision?

The assessment must be made on the balance of probabilities.

Is it more likely than not that the person lacks capacity?

Remember, a diagnosis of dementia does not mean that the person lacks capacity.

People should be supported to make as many decisions for themselves as they can.

## **Best interests decision**

Decisions made on behalf of a person without capacity should be made in their best interests, considering the person's known wishes, beliefs and their general well-being.

To decide what is in the best interests of a person who lacks capacity, consider:

- Their likely future capacity
- Their past and present wishes and feelings
- Beliefs and values likely to influence their decision
- Other factors that the person would likely consider

Best interest meetings bring together people to make difficult decisions.

You may be invited to best interest meetings to help in the decision-making process.

It's vital to remember that capacity is not a one-off decision but decision-specific.

For example, a person may be able to make choices about their daily life activities but lack capacity in financial areas.

Properly engaging the person in the decision-making process, listening to and taking account of their views, wishes and feelings is central to a best interest assessment.

It's important that someone is present who can represent the person's interests. This could be an [advocate](#), or trusted family member who is able to express the individual's and not their personal view about what is best.

You must be familiar with the Mental Capacity Act and should access appropriate training.

## **What does the Act mean for you when supporting people living with dementia?**

Everything you do has to be lawful: you work according to the law.

Imagine the following:

1. Mrs Evans is an 88-year-old lady with a diagnosis of vascular dementia. She requires two people to assist her in the shower. When you suggest a shower, she refuses.

- What do you do? What do you need to consider?

2. Mrs Lewis is a 63-year-old lady in the late stages of frontotemporal dementia. She does not use words to communicate. You notice that when you support her to dress, she winces and cries out whenever you put on her bra. You mention to her daughter that you think wearing the bra is causing her pain, however the daughter insists her mother wears it.

- What do you do? What do you need to consider?

3. You arrive at Mr Jones's home for a lunch-time call. You find Mr Jones, a 76-year-old gentleman with Alzheimer's Disease, dressed in a suit with his briefcase in his hand. He explains that he hasn't got time for visitors, he is on his way to work.

- What do you do? What do you need to consider?

These are all examples of how you might apply the principles of the MCA in your everyday work.

While it's impossible to give you a direct answer to any of these scenarios, your thinking needs to be in keeping with the MCA.

## **Principle 1: Assume a person has capacity unless proved otherwise**

Our starting point will always be the same. Has he/she got the capacity to make this specific decision?

If the answer is "yes", we cannot make Mrs Evans have a shower or stop Mr Jones leaving the house.

If, on the balance of probability, we believe the person lacks capacity to make that particular decision, we apply the principles of the MCA and justify our reasoning in the person's records.

If in doubt, we need to seek further advice. Remember, the assumption is that the person does have capacity.

## **Principle 2: Do not treat people as incapable of making a decision unless all practical steps have been tried to help them**

We need to think about our communication. Have we relied on verbal communication, when he/she would respond better to non-verbal communication? Have we simplified the choices?

For example, if we asked Mrs Lewis whether she wanted to wear a bra today she may not be able to make a decision.

But if we were to show her the bra and indicate we were giving her a choice through our facial expressions and gave her a choice of yes or no answers, she may be able to make this decision for herself.

## **Principle 3: A person should not be treated as incapable of making a decision because their decision may seem unwise**

We need to ask ourselves if we are making the decision based on what we believe is to be wise.

We may believe it's wise to shower every day, but perhaps Mrs Evan's has only ever bathed once a week.

## **Principle 4: Always do things or make decisions for people without capacity in their best interests**

We need to consider what is in the person's best interests.

Does Mrs Evans need to shower now? Is there an alternative? Would she prefer a wash with a flannel and a bowl of warm water? Does she feel uncomfortable because there's two people with her but would be ok with one person?

Is it in Mrs Lewis' best interests to wear the bra or are we doing it to keep her daughter happy?

## **Principle 5: Before doing something to a person or making a decision on their behalf, consider if you could achieve the outcome in a less restrictive way**

We may decide not to support Mrs Evans to shower on this visit but offer a basic wash.

Perhaps we can try again tomorrow, or a different time of day.

We may agree that Mrs Lewis will wear a vest as an alternative to a bra.

We may distract Mr Jones from leaving for work, or perhaps accompany him on a short walk, but we cannot stop him from leaving his own house, even if we believe he may come to harm.

To do so would be depriving him of his liberty and could be considered unlawful imprisonment, which is punishable under the MCA.

If you have any doubts about a person's capacity to make a decision, you need to report it to your senior and record it appropriately.



You are not expected to make decisions on behalf of a person who lacks capacity; your responsibility is to note your concerns and seek further advice.

## **Deprivation of Liberty Safeguards (DoLS)**

There are times when a person's freedom may be restricted to prevent them from coming to harm.

For example, we may prevent someone leaving a care home by locking the front door, for fear they may get injured on a busy road.

The MCA allows us to do this in the person's best interests, but we must be authorised to do so.

Deprivation of Liberty Safeguards (DoLS) are an amendment to the MCA and are the safeguards which protect a person who lacks capacity to consent to their care and treatment in order to keep them safe from harm.

The Court of Protection may authorise depriving a person of their liberty in their own home, a care home or a hospital.

Applying for authorisation is complex and bureaucratic and in March 2014, a House of Lords Select Committee concluding that the DoLS weren't fit for purpose and recommended replacing them.

The Mental Capacity (Amendment) Bill was introduced to the House of Lords on 3 July 2018 and seeks to replace the current system by:

- introducing a simpler process that involves families more and gives quicker access to assessments
- being less of a burden to people, carers, families and local authorities

- allowing the NHS, rather than local authorities, to make decisions about their patients, allowing a more efficient and clearly accountable process
- considering restrictions of people's liberties as part of their overall care package
- getting rid of repeat assessments and authorisations when someone moves between a care home, hospital and ambulance as part of their treatment

[New law introduced to protect vulnerable people in care](#)

## **Liberty Protection Safeguards (LiPS)**

The UK Department of Health and Social Care has accepted the Law Commission's proposed replacement for DoLS.

The changes to the Mental Capacity Act will include a new scheme called the Liberty Protection Safeguards (LiPS) and strengthen people's rights in areas such as best interest decisions.

The proposed LiPS scheme:

- Applies in any health and social care setting, not just care homes and hospitals
- Applies to anyone from 16 years old and above, rather than 18, as is the case with DoLS
- Introduces a two-tier system of protection:
  - In most cases, the 'responsible body' (typically the local authority for social care cases and the NHS for hospitals) would conduct a capacity assessment, making use of existing assessments where possible.

They would also assess whether the planned care arrangements are “necessary and proportionate”.

An independent reviewer would then approve the arrangements if satisfied.

- An Approved Mental Capacity Professional (replacing the Best Interests Assessor role) would only be involved in cases where the person objected to their care arrangements or had made previous statements that would indicate a likely objection.

We are therefore at a point of change.

At the moment many home care workers access people’s homes via a key safe and lock the door when they leave, because we do not want the person to come to harm.

It appears that in the future they will need to be authorised to do this.

[Updates about the Bill are available](#)

## **Case studies about dementia and the Mental Capacity Act and Deprivation of Liberty Safeguards (DoLS)**

[The Alzheimer’s society have three real life examples of DoLS](#)

[Video about how an Independent Mental Capacity Advocate supported a person living with dementia](#)

## **Useful resources**

Find out more about the Mental Capacity Act and Deprivation of Liberty Safeguards (DoLS).

[Mental Capacity Act \(2005\) full text](#)

[Key messages about the Act from the Alzheimer's Society](#)

[Information about DoLS from the Alzheimer's Society](#)

[Social care interventions and human rights: a practitioner's guide – the first case study deals with Deprivation of Liberty and dementia](#)

## **We want your feedback**

Help us to improve the Dementia resource for care professionals by telling us what you think about it in our short [four question survey](#).