Mental Capacity Act, Best Interest and Deprivation of Liberty Safeguards Policy

[Mandatory Read]

Lead Director Sian Thomas	**Date Reviewed** November 2023
Lead Author(s) Corrie Haxton, Senior Safeguarding Advisor	**Date Drafted** November 2023
Critical readers Sonia Shuter Named Nurse for Safeguarding Dr Jenny Jim, Head of Psychological Therapies	 December 2023
Recommended By Clinical Governance	**Endorsed Date** 14th December 2023
Approved By Clinical Governance and Safeguarding Committee	**Ratified Date** 11th January 2024
Published Date January 2024	**Next Review Date** January 2027

Contents

Policy

1 Purpose and Objectives

The purpose of this policy document is to provide staff working in The Children's Trust with guidance about the Mental Capacity Act and how it is applies, to ensure best interest decision making for our young people and adults, who lack capacity.

It sets out the main provisions of the Mental Capacity Act, local procedures, roles and responsibilities of staff. This policy is not a replacement for the Code of Practice, which is a guide about how to apply principles of the Act.

The objectives of the policy and this procedure are to:

- Establish and assign clear accountability for practices relating to the Mental Capacity Act and Deprivations of Liberty Safeguards at the Children's Trust
- Ensure that all colleagues are aware of their individual responsibilities in this area
- Comply with legal requirements in relation to the Deprivations of Liberty and Mental Capacity Act
- Manage the risk associated with children and young people making their own informed decisions where they have capacity and to protect those who do not have this capacity

Relevant laws and regulations include but are not limited to:

- Mental Capacity Act
- Deprivation of Liberties Safeguards

2 Scope

This policy applies to:

- all colleagues across The Children's Trust working directly with children and young people

3 Definitions

Unless otherwise stated, the words or expressions contained in this document shall have the following meaning:

DOLS	Deprivation of Liberty Safeguards
MCA	Mental Capacity Act
The Charity /Organisation	means The Children's Trust/TCT
SOP	Standard Operating Procedure

4 Policy Statement

1. Introduction

The Mental Capacity Act 2005 provides a legal framework to empower and protect vulnerable people over the age of 16 in England and Wales, who are unable to make certain decisions for themselves, i.e. about the care and treatment they receive; participation at school and in activities; their therapeutic and care plans and important decisions such as managing their finances and where they should live

Having mental capacity means that a person is able to make their own decisions. Capacity can vary over time and by the decision to be made. A lack of capacity could be the result of a permanent, temporary or fluctuating condition.

2. Mental Capacity Principles

Mental Capacity Act - The Five Key Principles

Within the MCA are five statutory principles which set a legal requirement that the individual is placed at the heart of the decision-making process, maximising their ability to participate, particularly in those decisions which are made on their behalf.

Principle 1 – Presumption of Capacity

The starting point when working with any individual is to always assume capacity "until there is proof that they do not" (MCA, 2005).

Principle 2 – All Practicable Steps

"All practicable steps" should be taken to help the person make the decision until it is confirmed that they lack capacity to make the decision. **Appendix A** Practical Steps to Promote Capacity provides guidance on tools that can support the formal assessment process e.g. who best to support the assessment; when it should be done, with whom; how to support communication and key questions to think about.

It is important that the individual is given all the relevant information about the decision that is required (in a way that they can understand). For example, the risk and benefits and potential alternatives.

Principle 3 – Eccentric or Unwise Decision Making

It is important to remember that individuals have the right to make unwise or eccentric decisions. The quality of the decision is irrelevant if the person understands what they are deciding.

Principle 4 – Best Interests

This principle sets a balance between autonomy and protection whereby decisions must be made in the individuals "best interests". Although the MCA does not define 'best interests' there is a clear checklist framework within the Act which guides practice **(see Appendix 2).**

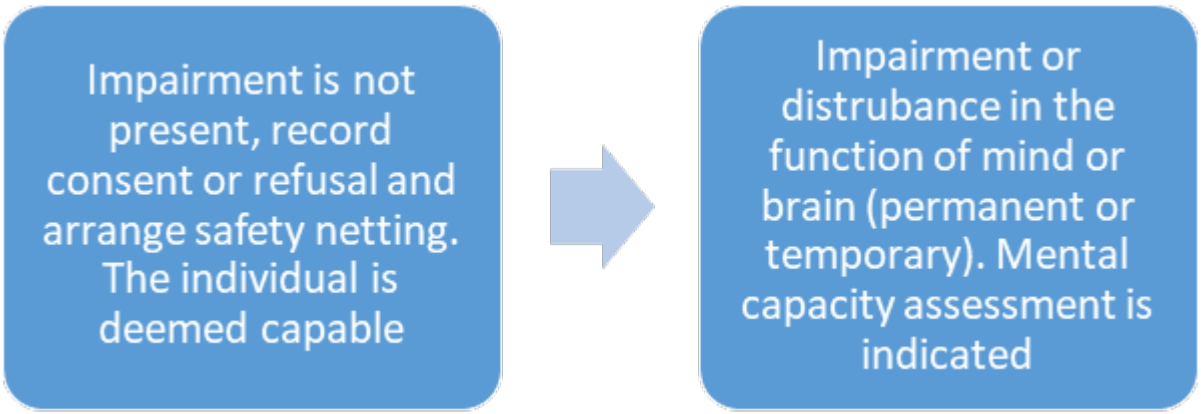
Principle 5 – Least Restrictive

This principles states that the least restrictive, effective option is chosen, which interferes least with the individual's freedom of action. The code of practice states that the restriction 'must be the minimum amount of force for the shortest period of time possible".

3. Assessing Capacity

The MCA sets a two-stage test for assessing whether a person lacks capacity to make a particular decision at a particular time. It is a "decision-specific" test. No one can be labelled 'incapable' or 'without mental capacity' because of a particular medical condition or diagnosis. The MCA 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 to unjustified assumptions about their capacity.

Functional test



- With all help given is the person able to understand the information relevant to this decision?
- Are they able to retain the information long enough to make the decision?
- Are they able to weigh the information as part of the decision-making process?
- Are they able to communicate the decision?

An answer of 'yes' in all of these areas means that the person has capacity.

An answer of 'no' to **any one** of these 4 areas will constitute a lack of capacity for the decision to be made.

Refer to the MCA Assessment Guidance **(Appendix B)** for further guidance.

4. Audit of Mental Capacity Assessments

Care Plans for our young people aged 16 and over include a section on mental capacity and the young person or adult's ability to consent to care, treatment etc. This will be reviewed at monthly key worker meetings, as capacity, particularly about young people with acquired brain injury can change.

5. Best Interests Decision Making Framework – Determining the best interest of Adults Who Lack Capacity

A best interest decision is only needed when the person aged 18 has been assessed as lacking capacity for the decision at the time it needs to be made. A person can be easily overlooked in the process and yet should be central to it; "there should be no decision about me, without me".

If a young person aged 16 and 17 years has the capacity to make decisions, but if parents disagree The Children's Trust will advocate on behalf of, or with the young person, by having conversations with their parents.

A Best Interest Template is available in the Clinical Toolkit, which should be completed when making a formal best interest decision as part of the MCA process (**see Appendix C).** Whilst many minor day-to-day decisions relating to a person's care may be recorded in case notes, significant decisions relating to assessment of capacity and best interests should be recorded.

When completing the template, there should be a clear connection with the *statutory checklist* for best interest decision making under the MCA (See Appendix 2). Attempts need to be made to capture the person's wishes, feelings, beliefs, and values and, if possible, to demonstrate the outcomes the person would like. The information captured from the Mental Capacity Assessment can inform the best interest decision, regarding the person's views and wishes. The checklist is not exhaustive; issues of culture, the person's physical, emotional, social and psychological wellbeing should be addressed.

By recording people's views and the weighing up process, you can demonstrate that, on the balance of probabilities, you have acted in the persons best interests.

Less restrictive options must always be considered and given greater priority in the weighing up process. Where there is no alternative, available options to consider, the decision to be made would be weighed against the known risks by not taking any action/providing treatment.

There may not always be agreement about what is in the best interests of an individual. Case records must clearly demonstrate that decisions have been based on all available evidence and have considered all the conflicting views.

If there is a dispute, the following courses of action can help in determining what is in a person's best interests: Involve an independent advocate, obtain second opinion, hold a formal or informal (multi-agency) case conference, go to mediation, as a last resort, apply to the Court of Protection for a ruling.

6. Protection for those Making Decisions

Emergency Treatment

When a person requires emergency medical treatment to save their life or prevent serious harm the 'reasonable' steps to determine capacity and best interests, including consultation with others, will differ from non-urgent situations. In emergencies it will always be in the person's best interests to give urgent treatment without delay.

Exceptions would be where either an 'advanced directive' has been made by an over 18-year-old while they had capacity to make the decision to refuse treatment for themselves, or where an 'advanced care plan' is in place. When making best interest decisions for a child or young person without capacity, a multi-disciplinary process involving parents must be undertaken.

Excluded Decisions:

There are some decisions which we are not entitled to take on behalf of someone else, known as excluded decisions (S.27 of the Act). You cannot decide in someone's best interest any of the following decisions: to have a sexual relationship, life sustaining treatment, to enter into a marriage or civil partnership, to a decree of divorce, to dissolve a civil partnership, to a child being place for adoption, to the discharge of the parental responsibilities on matters that do not relate to the child's property; to give consent under the Human Fertilisation and Embryology Act. These decisions relate to family and personal relationships and the best interest framework does not apply. The decision falls under other legislation or directed to the *Court of Protection*.

Research

The MCA sets out parameters for research which may be lawfully carried out if an "appropriate body" (normally a Research Ethics Committee) agrees it is safe, relates to the person's condition and produces a benefit to the person or people with a similar condition outweighs risk / burden. Parents or nominated third parties must be consulted and agree. If the person shows any signs of resistance or indicates in any way, they do not want to take part, they must be withdrawn from the research.

7. Applying Mental Capacity Assessments at The Children's Trust

For most decisions that are required for our young people and adults, formal assessment will not be required. For example, these day-to-day decisions will include social and leisure activities, whether the person is well enough to go to school, if they choose to participate in an activity or a session, whether they need to see a doctor, what clothes they want to wear, how their room is decorated, routines.

These are all types of decision that young people and adults with capacity would be able to make for themselves. If an individual is unable to do this, we must make decisions on their behalf and in their best interest and we must evidence this within our records.

For example:

- Jenny went to bed when she showed/communicated that she was tired.
- Amir chose to wear his red top and jeans.
- Susan appeared unwell, doctor informed, and she stayed home. She spent her morning listening to music.
- May attended her session but did not want to engage in activity so the session ceased/alternative offered.

Additionally, there will be reference to a young person or adult's mental capacity within their personal records.

A mental capacity assessment will be required when a child move from one house to another onsite, in line with other significant decisions which affect the young person. This will be carried out by Trust staff and documented. Should the child not have capacity to decide for themselves whether they agree with this move, there will be a Best Interests decision which will also be documented. The Local Authority social worker, parents and staff who know the child/young person well from their multi-disciplinary team will be given the opportunity to participate. For decisions about a child/young person moving out of the Trust the funder will take the lead on carrying out a Mental Capacity Assessment and any subsequent Best Interests Decisions with input from TCT staff to inform that decision making. If a formal assessment is required by staff at The Children's Trust, there is an MCA assessment template in the Clinical Toolkit and **Appendix D**

7. Deprivation of Liberty Safeguards/Restraint and Restriction

The Deprivation of Liberty Safeguards (DoLS) procedure is designed to protect a person's rights if they are aged over 18, 'deprived of their liberty' in a hospital or care home in England or Wales and lack mental capacity to consent to being there or to consent to their treatment and care. It is a way to ensure that individuals are looked after in a way that does not inappropriately restrict their freedom.

Is it a deprivation or a restriction of liberty?

Children at the Trust are likely to be deprived of their liberty by virtue of being 'under constant supervision' and not being 'free to leave'. Case law following the Cheshire West case points

to these restrictions being considered despite the restricted being because of the young person's physical or intellectual disability. The Law Society practical guidance can help decide whether a DoLS application is required. It can be hard to decide whether a restriction on liberty is a deprivation of liberty requiring authorisation, within the wide range of circumstances that may occur.
Further examples of types of restrictions on liberty in care homes includes: keypad entry systems, observation and monitoring, people needing an escort to go out into the community, limited opportunity for accessing fresh air and activities (including as a result of staff shortage), set times for access to refreshment or activities, limited choice of meals and where to eat them (including restrictions on residents' ability to go out for meals), use of restraint in the event of objections or resistance to personal care, mechanical restraints such as lap-straps on wheelchairs. For further guidance please see Guide to the Children's Homes Regulations including the quality standards April 2015 **(Appendix E)**.

16 and 17 years olds are also subject to the Mental Capacity Act. Parents are no longer able to be solely responsible for making decision on their behalf based on their parental responsibility. The Childrens Trust placement team will contact the placing Local Authority to inform them the young person has reached their 16th birthday and is likely to be deprived of their liberty due to the care they receive. It is the responsibility of the local Authority to seek legal consent for their deprivations.

How is deprivation of liberty authorised?
The House Manager will complete urgent and standard authorisations of Deprivations of Liberty Safeguards and share with the Local Authority. The Safeguarding Team can offer support with this. On receipt of an approved application from the relevant Local Authority House Managers to inform CQC.

The Deprivation of Liberty Safeguard Team in the Local Authority that provides funding for the individual will have a template authorisation form and will organise for a DOLs assessor and psychiatrist to visit the adult at The Children's Trust.

It is the responsibility of The Children's Trust to keep parents informed of the process and ensure that authorisations have not expired. The administrator for each house updates the information on a spreadsheet.

8. Further Advice
Staff can contact the safeguarding team regarding queries about The Mental Capacity Act and issues such as deprivation of liberty.

9. Training
Mental Capacity Act Training is included in online Induction for all staff and is discussed in mandatory safeguarding training.

Appendix 1 – Stakeholder Engagement Checklist

Review and complete the following checklist to indicate which stakeholders were consulted in the development of this policy.

#	Question	Yes/ No	Stakeholder(s) to be consulted
1	Is there a statutory requirement to have in place this policy/ does the policy need to comply with detailed legislation?		Audit, Risk and Governance team
2	Is implementation of the policy (or any element of it) dependent on the use of new or existing information technology?		Head of IT
3	Does implementation of the policy (or any element of it) place any demands on/ or affect the activities of the Estates and Facilities teams (e.g. does it impact the provision or maintenance of premises, equipment, vehicles or other TCT assets)?		Head of Estates
4	Does implementation of the policy or any element of it involve/ impact the processing of personal data?		Data Protection Officer
5	Does implementation of the policy require significant unbudgeted operational or capital expenditure?		Finance Director
6	Does implementation of the policy (or any element of it) directly or indirectly impact on the delivery of services / activities in other areas of the organisation? E.g. a policy written by a clinical lead in CF&S might impact on the delivery of care for CYP (Children and Young People) attending the school.		Relevant, impacted OLT members
7	Is there a need to consider Health and Safety or potential environmental impacts in developing and implementing the policy?		Health and Safety Manager
8	Have you consulted with a representative of those who will be directly impacted by the policy?		
9	Is there a need to consider Equity, Diversity, and Inclusion in developing and implementing the policy?		EDI Lead
10	Is there a need to consider sustainability and potential environmental impacts in developing and implementing the policy?		Lead for Responsible Organisation
11	Please detail any other stakeholder groups consulted, if applicable.		

APPENDIX 2

Practical Steps to Promote Capacity

Factors to consider when completing MCA assessment with young people:
Does the young person's capacity/communication/engagement fluctuate depending on factors such as fatigue/mood/memory/attention difficulties/comfort? Consider what factors affect this to select the optimum timing, environment and assessor to carry out the MCA. This may include:

1. Time of day: is the person more awake/alert on certain days or at certain times of the day?

2. Activities carried out prior to assessment which may have increased fatigue

3. Assessor: Is there a member of staff who the young person communicates most effectively with?
   Does the CYP require the presence of their speech and language therapist or member of staff who is trained to assess comprehension and maximise the CYP's communication ability?

4. Environment: does the young person communicate more effectively or feel more comfortable in certain environments? Select a quiet distraction free environment.

5. Optimise posture and comfort to increase engagement

6. Speak to the young person and their carers about instances that may be impacting their mood/stress levels and be prepared to change the timing of assessment

7. Would the young person like other people present at assessment (e.g. a family member)

8. Length of assessment: how long is the young person able to concentrate for? What strategies help, e.g. giving breaks

9. Does the young person require glasses/hearing aids? Ensure they are using these as appropriate.

10. Implementation of strategies to support communication, memory and engagement (see communication guidelines and talk to the young person's therapy team)

Tools:

1. Individualised communication guidelines
2. Use of individualised AAC systems if the young person is accessing these (these may include communication books, devices, choosing cards – see communication guidelines or talk to the young person's therapy team for more information)
3. Use of appropriate visuals such as photos to aid communication and memory
4. Talking mats may be considered for specific decisions

APPENDIX 3

Mental Capacity Assessment Guide

The Mental Capacity Act 2005 is the legal framework to empower and protect vulnerable people, aged over 16, who lack capacity to make certain decisions for themselves.
Five key principles emphasise the fundamental concepts and core values of the MCA:
1) Presumption of capacity: everyone aged 16 and over has a right to make their own decisions.
2) Individuals should be supported with practical/ appropriate help to make their own decisions.
3) Individuals can make what might be seen as eccentric or unwise decisions
4) Best Interest (BI) Principle - anything done for people who lack capacity must be in their 'best interests'. Once established that someone lacks capacity, a Best Interest decision must follow.
5) Anything done for people lacking capacity must be 'least restrictive' of basic rights.

The Code of Practice – online guidance for staff working with people who lack capacity to make certain decisions

<u>The Process of Assessing Capacity</u>

If there is a Deputy for Health and Welfare (over 18's only) a Mental Capacity Assessment will not be required. If unsure, seek advice from safeguarding team at TCT.
Mental Capacity Assessment & Best Interest decision templates are saved on Clinical Toolkit
Support with the process is available from managers and the safeguarding team
Formal assessment of mental capacity is indicated when the decision required carries an element of risk or if there is a conflict of views. It is completed by the decision maker ie the staff member recommending the course of action

Stage 1 – describe why a mental capacity assessment is indicated e.g. the individual has an acquired brain injury, learning disability, medical diagnosis.

Stage 2 - The member of staff completing the Mental Capacity Assessment will decide whether the person should be directly involved in the assessment, based on their

knowledge of the person and the communication guidelines in the care plan. If a person cannot communicate their decision in any way, they are deemed unable to make that decision, e.g. if the person has a disorder of consciousness or a severe cognitive impairment, evidence for not including the person can be copied from their communication guidelines in their care plan and be explicitly recorded on the assessment. Advice can also be sought from SALT and OT professionals.
In most cases the assessment will require consultation with the person and MDT. Staff should consider using methods/tools to promote understanding and decision making. The mental capacity assessment template guides staff through the assessment process.
An individual cannot make a particular decision if unable to do one or more of the following:
Understand the information given to them · Retain that information long enough to be able to make the decision · Weigh up information available to make the decision· Communicate their decision.
Following formal assessment, the staff member completing the assessment should inform the young person, parent, and relevant community professional of the assessment outcome. In the case of individuals who are residing here, the funding authority should be informed. Completed assessments are filed on the young person's personal records. Copies to be sent to parents, and local authority/funder at their request.

Recording day to day decisions:
Consent to daily activities do not require formal assessments of capacity but should be part of our daily interaction with young people/adults, in order to provide personalised and appropriate care. Staff will explain and offer choice about their daily activities and care and make informed judgements about the person's capacity to consent. When recording, staff should refer to issues such as 'capacity', 'consent' and 'best interests', for these day-to-day decisions, as well as for formal assessments.

If an individual's presentation/capacity to make decisions is changing, existing Mental Capacity Assessments must be reviewed.

The Process of Best Interest Decisions

Any act or decision made on behalf of a person who lacks capacity must be made in that person's 'best interests' whether minor or major issues. In caring for a young person/adult we should ensure we are using the least restrictive options. If we are restraining or using restrictive measures, we may be depriving someone of their liberty and should seek advice from the Local Authority/funder.
A best interest decision is only needed when the person is aged 18+ and has been assessed as lacking capacity for the decision at the time it needs to be made. For young people aged 16-17 who lack capacity, we will defer decision making to the adult with parental responsibility. For looked after children who are subject to a care order (Section 31) the Local Authority social worker will be the decision maker.
Best Interest decisions - when to hold a meeting: Only certain Best Interest decisions will require a meeting, e.g. when a course of action could have a harmful side effect, if there are multiple decisions to be made, or if there is conflict in the views of parents/ staff. Most Best Interest decisions can be made in discussion (face to face or telephone) with the young person, parents, staff.

Remember that a parent of an adult aged 18+ should be consulted but cannot make decisions for their 'child'. Unresolved Best Interest decisions may need referral to the Court of Protection. Seek advice from the safeguarding team at TCT.