

Policy Position Paper

Mental Capacity (England and Wales)

April, 2016

People must be supported in making as many decisions for themselves as possible, and where they are unable to do so, decisions must be made in that person's best interests.

Key Issues

Older people who lack mental capacity for some decisions have little or no voice and are among the most excluded groups in society today. They are all too frequently deprived of their human rights to freedom, respect, equality, dignity, and autonomy. Given that by 2021 it is predicted there will be around 1 million people living with dementia in the UK this is an ever-important issue.¹

It is vital that the core principle of the presumption of mental capacity is adhered to when assessments of capacity are being made. In practice stereotyping often leads to assumptions being made about lack of capacity to make a particular decision simply because someone is older, has dementia or is frail. Professionals may also have a lack of appreciation that older people may regain capacity or have fluctuating capacity. This is particularly important where decisions are taken with long-term consequences, for example treatment decisions.

The Mental Capacity Act 2005 (MCA) created a clear legal framework governing situations when a person's capacity to make decisions is in question. The Act includes 'Deprivation of Liberty Safeguards' (DoLS) for situations where people without capacity may be being deprived of their right to liberty, as a result of being confined to a hospital or care home. Care homes and hospitals have to seek authorisation if they consider they are, or may have to, deprive a person of liberty.

Despite the legislation a House of Lords Inquiry reporting in March 2014 found that social workers, healthcare professionals and others involved in the care of vulnerable adults are not aware of the MCA and are failing to implement it, and that the DoLS are 'unfit for purpose'. They recommended that overall responsibility for the Act be given to an independent body whose task will be to oversee, monitor and drive forward implementation, and the DoLS should be rewritten. The Inquiry also recommended that the role of Independent Mental Capacity Advocates (IMCAs), enshrined in the MCA, should be extended. Currently, the lack of timely access to effective advocacy remains a major barrier to achieving the aims of the legislation.

¹ Alzheimer's Society (2015) *Dementia 2015: Aiming higher to transform lives*

In 2014 there was a significant legal judgement handed down by the Supreme Court which revised the definition of a deprivation of liberty.² In effect, the judgement has widened the circumstances in which someone can be described as being deprived of their liberty. This has resulted in a huge number of applications to Local Authorities leading to breaches of the legal timescales for completion.

In response to these developments the Government has asked the Law Commission to review the DoLS and make proposals for legal reform in this area. They have consulted on draft proposals and are expected to make final recommendations early in 2016.

People can arrange a 'Lasting Power of Attorney' whilst they still have capacity so that someone else can manage their financial or welfare affairs should they become unable to. If they have not done this the Court of Protection can appoint a Deputy to act on their behalf. The Office of the Public Guardian (OPG) is responsible for ensuring this system works effectively, for example by maintaining a register of LPA's, supervising Deputies and making reports to the Court of Protection. The OPG has now introduced risk assessment into its supervision and also set up a safeguarding policy to respond to concerns about abuse.

Public policy proposals

- People must be supported in making as many decisions for themselves as possible, and where they are unable to do so, decisions must be made in that person's best interests. There should be tough regulatory action wherever the principles of the MCA are not being adhered to.
- Awareness raising and training in the Mental Capacity Act is essential for any staff who may hold responsibilities under its provisions. Improved training for all health and social care professionals is required to facilitate more timely access to MCA procedures.
- Councils must be properly resourced to undertake the assessments of deprivation of liberty, as well as reviewing cases in the necessary timescales. As a result of the Cheshire West judgement there are many people whose deprivation does not have suitable conditions placed on it or should not be occurring at all.
- A core principle of reform of the DoLS should be that restrictive care or treatment should only be sanctioned as a measure of last resort. For older people, too often, at the moment it is the first. Decision making must always seek to maximise capacity and independence.
- The MCA should be amended to give greater weight to an individual's wishes and feelings in a best interest decision. This would be a welcome step towards the goal of a workable system of supported decision making. Government should give consideration to the Law Commission's proposal that any restrictive treatment and care decisions should initially be challengeable in a specialist tribunal, rather than in the Court of Protection.

² P v Cheshire West and Chester Council and another https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf

- Decision making involving older people often takes place in times of crisis, under time pressure. More effective publicity of advance decision making, including via GPs, social workers and solicitors is required to help ensure that MCA procedures are able to operate more effectively in such circumstances.
- The services of an IMCA should be routinely offered in all circumstances in which they have the potential to be beneficial to older people. For example providing advocacy in adult safeguarding cases and also supporting the relevant person's representative (RPR) in DoLS cases.

Also see policy positions on Safeguarding older people, Crime and scams, and Consumer Vulnerability.

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