

Mental Capacity: An Overview

A person may lack capacity because they have:

- a learning disability
- a mental health problem
- a brain injury or stroke
- dementia.

The Mental Capacity Act affects anyone who works with or cares for people who lack capacity. It covers all major decisions where a person may lack capacity about their:

- finances
- property
- social care
- medical treatment and research
- daily arrangements
- personal care such as what they eat

It also covers what happens when the person can't make those decisions for themselves. If you can't make some decisions, the Mental Capacity Act says:

- you should have as much help as possible to make your own decisions
- people should find out if you can make a particular decision
- even if you cannot make a complicated decision for yourself, this does not mean that you cannot make more straightforward decisions
- even if someone has to make a decision for you, you must still be involved as much as possible
- anyone making a decision on your behalf must do so in your best interests
- The Act is clear about:
 - who can take decisions in which situations
 - how they should go about this

It also allows people to plan ahead for a time when they may lack capacity.

Useful information

<https://www.gov.uk/government/collections/mental-capacity-act-making-decisions>

<https://www.gov.uk/power-of-attorney>

<https://www.gov.uk/become-deputy>

<https://www.gov.uk/government/organisations/office-of-the-public-guardian>

Information for service users, carers, family and friends

Some people cannot make their own decisions about their care and treatment because they do not have the mental capacity to do so. These people need protection to ensure that they do not suffer harm, especially in situations where giving the necessary care requires their personal freedoms to be restricted.

Having mental capacity means being able to understand and retain information in order to make a decision based on that information.

Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards protects people:

- who lack mental capacity from having their liberties restricted when this is not in their best interests and to give people the right to challenge a decision

Care homes and hospitals

If you think that someone is being cared for in a way that deprives them of their liberty, you have to apply to the council for the deprivation of liberty to be legally authorised.

Tower Hamlets Council is responsible for arranging for the person to be assessed before deciding whether or not to allow the restriction of liberty to take place. The necessary assessments will be carried out by two independent assessors. One assessor will be a doctor and the other will be a Best Interests Assessor. The Best Interests Assessor may be a social worker, a nurse, an occupational therapist or psychologist.

The best interests' assessor will be aim to determine if:

- The care or treatment is a deprivation of liberty.
- The care or treatment is in the person's best interests and necessary to prevent harm to them.

The Best Interests Assessor must be a person who is not involved in any planning or decision-making about the person's care or treatment. We will consult relatives and other people close to the person and we may involve a special advocate in some cases.

If after the assessment, the deprivation of liberty is authorised for a limited time, we will reassess the situation to make sure the deprivation of liberty continues to be lawful.

We will appoint a suitable Representative if the person is being deprived of their liberty and this is in their best interest. A Representative can be a family member, friend or relative.

Supreme Court judgement

On the 19 March 2014, the Supreme Court handed down its judgements in the cases of P vs Cheshire West and Chester Council and another and P and Q vs Surrey County Council.

The Supreme Court found that there is a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights in the following circumstances: 'The person is under continuous supervision and control and is not free to leave, and the person lacks capacity to consent to these arrangements'.

The judgements suggest that the definition of a deprivation of liberty is wider than previously thought.

The Supreme Court held that a deprivation of liberty can occur in domestic settings where the State is responsible for imposing such arrangements. This includes a placement in a supported living arrangement in the community. Where there is, or is likely to be, a deprivation of liberty in such placements, this situation is not covered by the safeguards and it must be authorised by the Court of Protection.

What can I do if I believe that someone is being deprived of their liberty?

If you believe that someone in a care home or hospital is being deprived of their liberty without authorisation, you may write to the hospital or care home about your concern and ask for an assessment.

If you have contacted the care home or hospital and did not get a satisfactory response, you may write to:

Safeguarding Adults and Mental Capacity Act Team

Telephone: 020 8547 2019

Fax: 020 8547 2277

dols@towerhamlets.gov.uk

Information for Partner Organisations and Professionals

Deprivation of liberty Safeguards

Some people cannot make their own decisions about their care and treatment because they do not have the mental capacity to do so. These people need extra protection to make sure that they do not suffer harm, especially in situations where delivering the necessary care requires their personal freedoms to be restricted to the point of actually depriving them of their liberty.

Examples of a deprivation of liberty are:

- forcing a person to take medication against their will
- staff exercise complete control over a person's care and movements
- staff make all decisions about a person's assessments, treatments, visitors, being released into the care of others, where they can live.
- staff refuse to discharge someone to the care of relatives or others
- preventing someone from seeing friends or family

Supreme Court judgement

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The Supreme Court found that there is a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights in the following circumstances: 'The person is under continuous supervision and control and is not free to leave, and the person lacks capacity to consent to these arrangements'.

The judgements suggest that the definition of a deprivation of liberty is wider than previously thought. The present definition of what constitutes a deprivation of liberty is when someone is under constant supervision and control and is not free to leave.

The Supreme Court held that a deprivation of liberty can occur in domestic settings where the State is responsible for imposing such arrangements. This includes a placement in a supported living arrangement in the community.

Where there is, or is likely to be, a deprivation of liberty in such placements, this situation is not covered by the safeguards and it must be authorised by the Court of Protection.

How to apply for a deprivation of liberty authorisation

The Mental Capacity Act/Deprivation of Liberty Safeguards (MCA DoLS) covers people who lack the capacity to make their own decisions and when their personal freedoms need to be restricted in their best interests.

Before you apply for an authorisation you should always consider alternative ways to deliver care or treatment which avoid depriving someone of their liberty.

If you are a social or health care professional and think that someone is being deprived of their liberty, you should:

- discuss the case with the health or social care provider
- advise them to apply for a deprivation of liberty authorisation.
- report your concerns to the Practice Manager Mental Capacity Act Deprivation of Liberty Safeguards.

How do I apply for a deprivation of liberty authorisation?

If the Managing Authority (care home or hospital) believe that it is necessary to deprive a person of their liberty in order to provide them with appropriate care and treatment, they should complete a request for an authorisation for a deprivation of liberty and send it to the Supervisory Body. For people normally resident in Tower Hamlets, or in placements funded by The London Borough of Tower Hamlets this is:

Safeguarding Adults and Mental Capacity Act Team

Telephone: 020 8547 2019

Fax: 020 8547 2277

dols@towerhamlets.gov.uk

On receipt of the application the team will arrange for a series of assessments to decide if it is right to deprive the person of their liberty.

People who lack capacity may be deprived of their liberty in settings such as supported living units. Providers who are concerned that their care plans in these settings may amount to a deprivation of liberty should ask the safeguarding and MCA team for guidance and this may mean the responsible team will make an application directly to the Court of Protection.

Independent Mental Capacity Advocates (IMCAs)

Our team will need to know whether the person has a family member or non-professional carer to support them through the assessment process. If not, we will appoint an Independent Mental Capacity Act Advocate (IMCA). Tower Hamlets ensures the provision of IMCAs through POHWER.

To find out more, visit this webpage:

http://towernet/document_library/adult_care_services/quality_and_performance/adult_social_care_safeguarding/IMCA

Authorisation or non-authorisation of a deprivation of liberty

Not every assessment will result in an authorisation. However, if an authorisation is granted, we will appoint a representative to support the person and look after their interests. You will need to provide the representative with information about the person's care and treatment.

You must make regular checks to see if you still need the deprivation of liberty. If there has been a change in the person's situation that requires deprivation of liberty to be altered, temporarily suspended or terminated altogether, we will have to carry out a review.

If we turn down an authorisation request, you must not deprive the person of their liberty. You will need to take alternative steps and will be advised about this.

How to get in contact?

For further information, please contact:

Safeguarding Adults and Mental Capacity Act Team

Telephone: 020 8547 2019

Fax: 020 8547 2277

dols@towerhamlets.gov.uk

Independent Mental Capacity Advocates (IMCAs)

The IMCA service for the London Borough of Tower Hamlets is provided by POhWER who can be contacted on 0300 456 2370 (charged at local rate) or via email - pohwer@pohwer.net

An IMCA can be instructed where there is a decision to be made regarding one of two specific issues:

- Serious medical treatment
- A change of accommodation.

Serious medical treatment applies where an NHS body proposes to provide, withdraw or withhold treatment. Change of accommodation applies where an NHS body or Local Authority proposes a move for the person to hospital for more than 28 days or to alternative accommodation for more than 8 weeks.

In addition to the above, there is a duty to consider whether it would be of benefit for an IMCA to be instructed for the following issues:

- Safeguarding Adults from Abuse
- Care Reviews

Safeguarding Adults from Abuse applies where the NHS body or Local Authority have commenced Safeguarding procedures and the person lacks capacity regarding any of the protective measure being proposed. This is the only issue that the person can have family or friends appropriate and practical to consult and still have IMCA support.

Care Reviews applies where the NHS body or Local Authority have can instruct an IMCA to support and represent a person who lacks capacity when they have arranged accommodation for that person or they aim to review the arrangements as part of a care plan or otherwise.

What is an IMCA?

IMCAs are specialist advocates who provide support adults who lack the mental capacity to make some important decisions. The IMCA service is provided in accordance with the Mental Capacity Act, 2005. The Mental Capacity Act also defines who needs an IMCA an also the role of the IMCA.

Who should have an IMCA?

If you are an adult without family or friends, and you lack capacity, you are entitled to an IMCA when people are making important decisions about things such as:

- serious medical treatment
- where you will live

You may also get an IMCA when you do not have the capacity to agree to arrangements to safeguard you.

What do IMCAs do?

- Find out your wishes, feelings, beliefs and values and what these would probably be if you had capacity.
- Support and represent you to work out whether the proposed decision is in your best interests.
- Get the views of professionals and paid workers providing care or treatment for you
- Provide information to professionals to help work out what is in your best interests
- Check that the decision is being made in line with the Mental Capacity Act
- Write a report which must be considered before they make the decision.
- They are independent of the person making the decision

IMCAs do not:

- Make the decision
- Carry out the capacity test
- Persuade you what to do
- Decide who is the right person to talk to
- Have as extensive a role as other advocates