



Prifysgol Cymru
Y Drindod Dewi Sant
University of Wales
Trinity Saint David

ECAY5003: The Evolving Landscape of Advocacy Provision Mental Capacity 2023

Trawsnewid Addysg; Trawsnewid Bywydau
Transforming Education; Transforming Lives



www.uwtsd.ac.uk

The Mental Capacity Act (2005)

- Came into force in early 2007
- Introduces the new statutory role of the Independent Mental Capacity Advocate (IMCA)
- An Independent Mental Capacity Advocate will represent individuals and contribute to 'best interest' assessments under the Mental Capacity Act 2005.

Question

- What does 'capacity' mean to you?
- What situations do you think warrant the conclusion that someone lacks capacity?

Capacity

- Every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise.
- Individuals must retain the right to make what might be seen as eccentric or unwise decisions.

Capacity

- Anything done for or on behalf of people without capacity must be in their best interests
- Anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

How is mental Capacity Assessed?

- The MCA sets out a 'two-stage' test of capacity:
- 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 that the person is unable to make a specific decision when they need to?
- People can lack capacity to make some decisions, but have the capacity to make others.

How is mental Capacity Assessed?

- Mental capacity can also fluctuate with time
 - Someone may lack capacity at one point in time but may be able to make the same decisions at a later point in time.
- Where appropriate, people should be allowed the time to make a decision themselves.
- [Mental Capacity Act - Social care and support guide - NHS \(www.nhs.uk\)](http://www.nhs.uk)

Mental Capacity Act (2005)

- The Advocacy Code of Practice (2007) offers a key definition of 'a person who lacks capacity'.

“Whenever the term ‘a person who lacks capacity’ is used, it means an individual who lacks capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken”

(Bogg and Chamberlain, 2015)

Independent Mental Capacity Advocate (IMcA)

- To support and represent the individual who lacks capacity.
- To uphold the principles of the Mental Capacity Act (2005), to ensure that the Act is complied with.
- To find out the wishes, values, views and beliefs of the individual.

Role of the IMcA

- To ensure the individual is involved with the decision-making process as far as they are able to.
- To ensure that information is provided to the individual in a way that they can understand using their preferred method of communication
- To consult with others regarding the decision to be made

An IMcA Must Be Instructed Where:

- There is a decision to be made regarding either serious medical treatment (SMT) or change or accommodation.
- AND
- The person has no close family or friends to represent their views
- AND
- The person has been deemed by the Decision Maker not to have capacity to make that decision in accordance with the assessment of capacity as defined by the Act.

This can Include:

- People with dementia or mental ill health
- People with learning disabilities
- People with physical disabilities
- People who have had a stroke
- People with brain injuries
- People who are unconscious or in a coma.



Duty of Provision

- From October 1st 2007, Local Authorities and Local Health Boards/Trust Bodies in Wales had a DUTY to instruct an Advocate (IMcA) to support an individual if they meet the criteria as outlined in the Mental Capacity Act 2005.

Deprivation of Liberty

- Occurs when:
- The person is under continuous supervision and control and is not free to leave, and the person lacks capacity to consent to these arrangements
- When do you think this may be necessary?

Deprivation of Liberty Safeguards (DoLS)

- Referrals for DoLS can only be made by the Supervising Body in the NHS or Local Authority.
- An IMcA may be involved in the assessment process and then to provide support to the individual that is deprived of their liberty and in some cases to also support their family and friends.
- Strict set of 'checks' that aim to make sure that any care that restricts a person's liberty is both appropriate and in their best interests.
- DoLS only apply for people in care homes and hospitals.
- There is a separate system for people in 'supported living arrangements' – where people live and receive care in the community.

Key Elements of DoLS

- To provide the person with a representative – a person who is given certain rights and who should look out for and monitor the person receiving care
- To give the person (or their representative) the right to challenge a deprivation of liberty through the Court of Protection
- To provide a mechanism for a deprivation of liberty to be reviewed and monitored regularly

DoLS

- Local Authority will appoint an assessor to determine if conditions are met to allow deprivation of liberty under the safeguards:
- The person is 18 or over (different safeguards apply for children)
- The person is suffering from a mental disorder
- The person lacks capacity to decide for themselves about the restrictions which are proposed so they can receive the necessary care and treatment

DoLS

- The restrictions would deprive the person of their liberty
- The proposed restrictions would be in the person's best interests
- Whether the person should instead be considered for detention under the Mental Health Act 2005
- There is no valid advance decisions to refuse treatment or support that would be overridden by any DoLS process.



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Liberty Protection Safeguards

- In 2019, changes were made to legislation, and came into force in 2022.
- DoLS has been replaced by 'Liberty Protection Safeguards' and has made the following changes:
 - Applies to any setting, including a persons own home
 - Will apply to 16 and 17 year olds.

Liberty Protection Safeguards

- There will also be an increased role for care homes:
 - Managers will be responsible for arranging assessments and co-ordinating the process and confirming in a statement to the Local Authority that the arrangements give rise to a deprivation of Liberty.
- The person lacks capacity to consent;
- The person is of 'unsound mind', meaning that they have a mental health disorder;
- That the arrangements are necessary and proportionate;
- Whether the person is objecting to the arrangements;
- That consultation with named people close to the person has taken place;
- Whether an Independent Mental Capacity Advocate should be appointed

Mental Health Advocacy

- According to former chairperson of the UK Advocacy Network, Andrew Wetherall, an effective advocacy service is:

“Adequately funded, proactive as well as reactive... plus properly trained, supported and supervised staff... (with) effective policies and procedures in place... (and) a ‘healthy diplomatic tension’ between themselves and service providers”

So, What Is Capacity?

- The Mental Health Act (2005) defines capacity as:
- "A Person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment or, or a disturbance in the functioning of the mind or the brain"

Discussion

- Do you agree with this statement?

Capacity Recap

- A presumption of capacity – every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise
- The right for individuals to be supported to make their own decisions – people must be given all appropriate help before anyone concludes that they cannot make their own decisions
- That individuals must retain the right to make what might be seen as eccentric or unwise decisions
- Anything done for or on behalf of people without capacity must be in their best interests,
- Anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

TASK

Please watch the following video
and discuss the key issues raised.



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