

Beyond Limits Dumfries & Galloway provides policies and procedures to promote safe and consistent practice across the Organisation. The framework laid down within our policies and procedures lets everyone know how we work and reflects our values and mission statement. Our policies and procedures are written to help us, employees of Beyond Limits Dumfries & Galloway, to make good, safe decisions.

Beyond Limits Dumfries & Galloway expects all employees to be familiar with the contents of all policies and procedures relevant to their role and to understand how to apply them within their daily work.

None of these documents stand alone, all fit within the larger framework of the way we work and any associated policies which are particularly relevant will be directly referenced.

# Capacity

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## Capacity Policy – what this means to Beyond Limits Dumfries & Galloway

The Mental Capacity Act (MCA) 2005 is one the most far-reaching and exciting pieces of legislation to affect the people we support for a very long time.

Beyond Limits Dumfries & Galloway embraces it and will use it to promote decision-making and protect (but not limit) the decision's made on behalf of people who lack the capacity to make decisions for themselves in certain areas of their lives.

### MCA has five principles:

1. **We must begin by assuming the person has capacity** unless it is established that the lack of capacity to make the decision in question at that time (because of their behaviour, previous capacity issues similar to this decision or information available from others suggest they lack capacity to make the decision).
2. **People must be helped to make decisions** by taking all 'practicable steps' to help them and only deem them unable if they still cannot make the decision in question.

3. **Unwise decisions do not necessarily mean lack of capacity.** This means people may make decisions that we would not make ourselves, or that may seem risky or unwise. This in itself is not a reason to assume the person lacks capacity.
4. **Decisions must be taken in the person's best interests.** If on assessing a person as lacking capacity to make a decision, any decision made on behalf of, or act done must be done, or made in the person's best interests
5. **Decisions must be as least restrictive of freedom as possible.** If on assessing a person as lacking capacity to make a decision, any decision made on behalf of, or act done must have the least restrictive effect on the person's rights and freedoms

All employees at Beyond Limits Dumfries & Galloway are required to adhere to these principles and will receive training and support to enable them to feel confident in supporting decision-making and identifying when someone lacks capacity and requires the involvement of others to make decisions or act on their behalf.

## Procedure: what will happen:

This is what Beyond Limits Dumfries & Galloway will do to ensure the MCA underpins all that we do.

Your role under the MCA as an employee of Beyond Limits Dumfries & Galloway

- Initially when Beyond Limits Dumfries & Galloway carries out a Service Design with a person we are going to support, the questions of capacity in all areas of their lives will be discussed and recorded in these documents for the person and their team to work to. Consent to be supported or receive treatment<sup>1</sup> will be captured as we work with the person, their circle of support and any legal representatives who have the jurisdiction to make decisions on their behalf and this will be recorded in the Working Policy and all decisions made will be reviewed on a regular basis.

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**PLEASE NOTE:** Beyond Limits Dumfries & Galloway does not provide treatment but this may be part of the person's overall support and be recorded as given by another professional.

**When reviewing the Working Policy, we will consider if the person lacks capacity to make certain decisions, the best interests' guidelines:**

- Do not make assumptions about someone's best interests based on their age, appearance, or behaviour.
- Take all relevant circumstances into consideration
- Make sure you have whatever possible to encourage the person to take part in the decision-making, or improve their ability to.
- Consider any past or present beliefs and values (e.g. religious, cultural or moral) that would be likely to influence the decision in question and any other relevant factors.
- There must be no discrimination.
- Our aim is to increase decision-making and people's control over their own lives so you will be supporting and teaching people to gain skills, gain confidence and even if capacity is in doubt, and others act on their behalf to begin with, our aim is for people to make as many decisions for themselves as they can over time.
- In your everyday work you will come across situations that require a decision to be made by the person you support. Under the MCA you will be routinely thinking through how to support the person to make 'informed' choices, from what to wear when they get up to what they want to spend their money on. You will assume they have the capacity to make these decisions unless you have, or begin to see evidence that they are unable to make a particular decision.
- When this occurs your role under the MCA changes to one of an 'assessor'; assessing whether or not they have the capacity to make that particular decision.
- You are protected under the MCA from legal action when providing support or taking action on behalf of a person who support who lacks capacity to make a particular decision on the following:
  - Help with washing, dressing, or attending to personal hygiene
  - Help with eating or drinking
  - Help with walk and assistance with transport
  - Help with arranging household services such as power supplies, housework, repairs and maintenance
  - Domiciliary related acts
  - Acts associated with a change of residence
  - Acts associated with the person's safety



- Acts associated with adult safeguarding procedures
- **As long as you can show:**
  - You are meeting the principles of the MCA
  - You are working under a proper assessment of capacity and reasonably believe the person cannot take decisions about the relevant aspects of their care
  - You reasonably believe that what you are doing is in the person's best interests
  - Any restrictions of freedom are reasonable and proportionate.
- If a decision is being made about a physical intervention you must work within the CALM framework and guidelines:
  - A full CALM assessment must be completed to determine the extent and nature of physical intervention required if any.
  - You believe that physical intervention is absolutely necessary to prevent the person coming to harm.
  - You ensure the physical intervention used is reasonable and in proportion to the potential harm. Please see the Restrictive Physical Intervention Policy.

### Deprivation of Liberty Safeguards

Deprivation of Liberty Safeguards (DoLS) is an amendment to the Mental Capacity Act 2005. It also introduces Liberty Protection Safeguards (LPS), the Law Commission's proposed replacement for DoLS.

DoLS ensures people who cannot consent to their care arrangements in a care home or hospital are protected if those arrangements deprive them of their liberty. Arrangements are assessed to check they are necessary, and in the person's best interests.

(Scotland uses the Adults with Incapacity (Scotland) Act 2000, which includes provisions for managing the care of adults who lack capacity. This Act focuses on ensuring that any deprivation of liberty is necessary, the least restrictive option, and in the person's best interests.)

As Beyond Limits Dumfries & Galloway provide support to people in their own home, an application to the Court of Protection in the person's best interest must be used to restrict or restrain any person we support in any way. This would be completed with a multi-disciplinary team ensuring a best interest meeting is held for the person.



## When an assessment of capacity should be made

- Please refer to the capacity process flow chart

The MCA gives a two-stage test of capacity which should be used to see whether an assessment of capacity is required.

1. **Is there an 'impairment of or disturbance in the functioning of a person's mind or brain' affecting their ability to make a decision?** A person's capacity to make decisions can be affected by lots of things: confusion, substance misuse, learning disability, mental health problem, dementia but having mental health problems or a learning disability does not necessarily mean that the person lacks the capacity to make *all* decisions. This is where the second step comes in;
2. **Is that 'impairment or disturbance in the functioning of a person's mind or brain' sufficient that the person lacks the capacity to make that particular decision at that particular time?**

If the decision in question is a complex one you should consult with other people and a best interest's decision or meeting may be required (we will discuss this later). These other people might be social worker's, GP and other professionals.

**Complex decisions must never be made by a Support Worker alone.**

## Examples of complex decisions

- Where there is disagreement with the person, their family or others about their capacity to make a decision.
- Where the person's capacity may be challenged by someone
- Decision over life sustaining and other serious medical treatment
- Reporting abuse or crime
- What other people may be put at risk
- Whether a person should move to new accommodation
- Whether the person should receive care or support at home
- Where the decision has legal complications or consequences such as liability
- Where there are significant financial or property issues.

## Decision making steps

There are 5 steps to assessing whether a person lacks the capacity at the time that the decision is required. The person must be able to complete all 5 steps or they are likely to lack capacity:

- 1. Can the person understand the information relevant to the decision – generally what the decision is and why they need to make it?** This is where it is really important we make information as accessible as possible for the person, and really understand how they communicate. These are some of the ways to help a person understand information:
  - Use pictures, photos, Makaton, or any other communication tool.
  - Give information with someone present who knows the person well
  - Somewhere the person feels comfortable and able to concentrate
  - Give time for them to absorb, discuss and reflect on the information
  - Give information at a time of day they are most alert i.e. not after medication
  - Give information in manageable chunks
  - Give information separately on each different topic
  - Ask a person in the same situation, or who has had to make the same decision to explain it to the person.
- 2. Can the person remember the relevant information for as long as it takes to make the decision?** The person only has to understand the information for as long as it takes to make the decision. However, you must be aware if you begin to consider the person lacks the capacity to make the same decision at a future date then the process must be followed again.
- 3. Can the person consider the information and weigh up the importance of it and pros and cons?** Can they grasp the basics of what the outcome of the decision might be?
- 4. Can the person communicate their decision?** This does not need to be through talking, it can be through gesture, signing or however the person communicates usually.
- 5. Decisions that can never be taken on someone else's behalf.**
  - Marriage
  - Civil partnership
  - Divorce
  - Sexual relationships
  - Adoption



- Voting
- Consent to fertility treatment
- If an assessment is carried out because there is doubt about a person's capacity to make a decision and that decision is then made on behalf of that person by others these people become known as the 'decision-makers'.
- Best interest's decisions are usually made by a group of people of which Beyond Limits Dumfries & Galloway employee may be a member. Others may include the care manager, Court of Protection Deputy, family, health employee, other professionals, and people from the person's circle of support.
- The decision-makers should follow a best interest's checklist when reaching a best interests decision. **Guidelines include:**
  - Do not make assumptions about someone's best interests based on their age, appearance, or behaviour.
  - Take all relevant circumstances into consideration.
  - Make sure you have whatever possible to encourage the person to take part in the decision-making, or improve their ability to.
  - Consider any past or present beliefs and values (e.g. religious, cultural or moral) that would be likely to influence the decision in question and any other relevant factors.
  - Consider the views of other relevant people in particular; anyone the person asks you to consult, those involved in supporting the person (Beyond Limits Dumfries & Galloway employee) anyone else interested in their welfare, an IMCA, holders of LPA and Court appointed Deputies.
  - Consider if it is likely that the lack of capacity is a temporary one. If so, the decision should be deterred until they are able to make the decision.
  - If the decision is life sustaining medical treatment it must not be motivated by a wish to hasten the person's death.
  - There should be no discrimination.

## Advanced decisions

Some decisions that need to be made are difficult and require sensitive support, but in an age where people are living longer with the advances of medical technology you may support people who have capacity which becomes impaired over time due to illness or old age.

If a person you support has capacity and wants to plan for the future when their capacity may become impaired there are two ways they can do this:

1. **Lasting Power of Attorney (LPA)** where a person over 18 with capacity can appoint another person to take decisions about health, welfare and property if, in the future they lose the ability to do so themselves. LPA's have to be registered with the Office of the Public Guardian and must always act in the person's best interests.
2. **Advance decisions** where a person over 18 with capacity makes an advance decision about receiving medical treatment should they later lose capacity. This is a useful tool for someone with an enduring mental health need that requires treatment at a time the person may not have the capacity to make a decision about a particular medical treatment. E.g. if they don't want certain psychotropic drugs used. Advance decisions can include refusal of resuscitation or lifesaving treatment. They must be respected and are legally binding (but have to be set out properly).

It is important that Beyond Limits Dumfries & Galloway is aware of any LPA or Advance decisions in place as people involved or decisions made must be included in support planning and details must be recorded in Working Policies.

## Independent Mental Capacity Advocate (IMCA)

IMCA's safeguard the interests of people who lack capacity to make important decisions and have no one except paid employee to advise and support them.

If the decision is required quickly there should be no delay in one being appointed. If there is a delay contact the appropriate service leader who will take the matter further. IMCA's have the right to see all relevant support records. They must be given a written copy of the assessment decision, and the reasons for it.



# Court of Protection and Deputies

## Court of Protection

- The Court rules on any matter covered by the MCA for example whether someone has capacity and what is in their best interests.

## Court of Protection Deputy

- A Deputy is a person appointed by the Court of Protection and given rights and responsibilities to make decisions about a person's (deemed to lack capacity) finances (benefits and savings) and/or welfare when the person is assessed to lack that capacity. This means they have legal rights to access the person's financial records and legal responsibility that make them accountable for these decisions. A Deputy can be checked on by the Court of Protection at any time and therefore they require evidence to support decisions and financial spending if necessary.

### **Financial Transaction evidence for Court of Protection Deputies**

- For those people Beyond Limits Dumfries & Galloway supports who have a Court of Protection Deputy we must ensure that evidence of financial transactions we have been involved in on their behalf are given to them on a regular basis as the Deputy will be monitored by the Court of Protection and this evidence will be required. Doing this also ensures Beyond Limits Dumfries & Galloway are checking for any financial irregularities in money they handle that belongs to the people we support.

### **The Process we should follow.**

1. For the people we support who have a Deputy (these will usually be The Council or family members) we may be asked to support the person to spend the money that is held by the Deputy. In which case we must keep evidence that we are doing so as the Deputy require, and that we are doing so in ways that safeguard the person's finances.
2. As we are involved in handling a person's money, we must therefore follow Beyond Limits Dumfries & Galloway policies around handling money, but we must also ensure we have

agreement with the Deputy and evidence for the Deputy that the way we are supporting the person to spend their money safeguards their finances.

**This is the process to follow:**

1. The working policy developed must **record** who the Deputy is.
2. When developing the working policy, we must **agree with** the Deputy financial standards including a budget (weekly or monthly), what we are going to support someone to do (e.g. withdraw money from cash point, reconcile money, count the petty cash or pay at the checkout). The budget should include what items money can be spent on and an amount (e.g. £30 a week for food, £40 a month on clothes), what level of spending above which the Deputy wants to be notified and give the OK for (this is usually around £50) and anything else the Deputy wants to be consulted about.
3. The Service Leader should also agree with the Deputy whether they wish receipts to be kept at the person's home or to be sent to them on a monthly basis (this should be recorded as part of the financial section of the working policy).
4. **Monthly** the Service Leader should be given the receipts by the Team Leader for the month and reconcile the figures on a summary sheet. Photocopies of receipts should be made for Beyond Limits Dumfries & Galloway records (if original receipts are going to be sent to the Deputy).
5. The Service Leader should alert the Director should they find any discrepancies whilst reconciling the expenditure.
6. A copy of the monthly reconciled figures should be **sent** to the Deputy (with receipts additionally if requested).
7. A copy of the monthly summary sheet should be kept in the Beyond Limits Dumfries & Galloway file for the person in the central office.

## Office of the Public Guardian (OPG)

- The OPG keeps a register of holders of LPA's and Deputies and monitors what they do. The OPG has 'visitors' that can be called on to investigate concerns about the conduct of holders of LPA's and Deputies.

- Deputies and LPA holders have to keep records of the decisions made on behalf of a person and if they look after their finances accounts to show how financial decisions have been made, and how money has been spent. They could be asked by an OPG visitor to present this information.

## When the Mental Health Act 1983 (MHA) should be used rather than the Mental Capacity Act 2005 (MCA)

Before an application can be made under the MHA decision-makers (not Beyond Limits Dumfries & Galloway employee) should consider whether they could achieve their aims safely and more effectively by using the MCA. Beyond Limits Dumfries & Galloway employee may be included in discussions about the best interests of a decision to use the MHA and should bring any information on how support is/or can be provided to keep the person safely in their chosen environment.

- The MHA should be used when:
  - The required treatment cannot be given without detention under the Act
  - The required treatment cannot be given under the MCA (for example where the person made a valid advance decision to refuse treatment that they now require)
  - The person requires physical intervention in a way not allowed under the MCA
  - The person is expected to regain capacity and may then refuse treatment or part of the treatment they require.
  - There is some other reason the person might not get treatment and they or someone else may suffer as a result.

## Consent to taking part in research

If a person we support is approached to take part in research and they lack the capacity to make that decision then:

- A family member, friend or other independent person must be consulted and agree to the involvement.
- If the person shows any signs to not being happy to take part then the involvement must end
- A research ethics committee must have checked and approved the research

- The committee must have agreed that research could not be done as well with people who have capacity.
- The committee must also have agreed to what the researcher will do if the person loses capacity whilst the research is underway.
- All other normal decision-making guidelines and other code of practice principles apply

## Mental Capacity and Housing/tenancies

- No one, whatever level of capacity should be precluded from having their own home; as a tenant or home owner. There are steps to take in both situations. However, if a person lacks mental capacity to sign a tenancy agreement or terminate it then the tenancy can only be signed by someone authorised to do so by the Court of Protection because a tenancy agreement is a legal document covered by 'property and affairs'.
- Sometimes the landlord of the property may not require a signature on the agreement. However, this practice is discouraged by the Court of protection as it could make the tenancy agreement unenforceable and put the person's living arrangements at risk.
- When working with a person to understand their tenancy we should follow the principles of the Mental Capacity Act which are that:
- **We must begin by assuming the person has capacity** unless it is established that the lack capacity to make the decision in question at that time (because of their behaviour, previous capacity issues similar to this decision or information available from others suggest they lack capacity to make the decision).
- **People must be helped to make decisions** by taking all 'practicable steps' to help them and only deem them unable if they still cannot make the decision in question (by using simple language, photos etc.).
- Only after we have tried whatever ways we feel will help them understand the 'essentials of the deal' as detailed below should we consider taking further steps.
- The Department of Health information agency DH Care Networks Housing LIN Factsheet 20 says that for someone to understand their tenancy they need to 'understand the essentials of the deal' so we need to evidence that:
  - The person has basic concept of money
  - Understands the concept of owning it and exchanging it in return for something
  - Basic concept of promises and rules which need to be abided by (even if they require help to manage to keep what they promise)

- If after every effort we feel the person lacks capacity to understand and agree to their tenancy then the following steps should be taken with the full involvement of the person's family and/or care manager
  - If the person only requires their tenancy signing/terminating then an application can be made for an order specifically dealing with this, however if the person lacks the capacity to manage other aspects of their property, affairs and welfare and have other assets and income other than social security benefits then it will usually be necessary to appoint a deputy to deal with it all (local authority, family or solicitor usually).
  - It will assist the Court of Protection if you contact them by email or phone before making an application so that you do not make mistakes that may mean the application is rejected or sent back. Contacts are:

**Email:** [courtofprotectionenquiries@hmcts.gsi.gov.uk](mailto:courtofprotectionenquiries@hmcts.gsi.gov.uk)

**Telephone:** 0300 456 4600

## Glossary of Terms

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**Advance decision to refuse treatment (ADRT)** – allows an adult with capacity to set out a refusal of specified medical treatment in advance of the time when they might lack the capacity to refuse it if it is proposed. If life-sustaining treatment is being refused, the advance decision has to be in writing, signed and witnessed and has to include a statement saying that it applies even if life is at risk.

**Best interests** – the duty of decision makers to have regard to a wide range of factors when reaching a decision or carrying out an act on behalf of a person who lacks capacity

**Capacity** – the ability to make a decision

**Court of Protection** – where there is a dispute or challenge to a decision under the Mental Capacity Act 2005, this Court decides on such matters as whether a person has capacity in relation to a particular decision, whether a proposed act would be lawful, and the meaning and effect of a Lasting Power of Attorney or Enduring Power of Attorney.

**DOL** – Deprivation of Liberty

**Independent Mental Capacity Advocate (IMCA)** – an advocate who has to be instructed when a person who lacks capacity to make specific decisions has no one else who can speak for them. They do not make decisions for people who lack capacity, but support and represent them and ensure that major decisions regarding people who lack capacity are made appropriately and in accordance with the MCA.

**Lasting Power of Attorney** – a power under the MCA that allows an individual to appoint another person to act on their behalf in relation to certain decisions regarding their financial, welfare and healthcare matters.

**Office of the Public Guardian** – this official body registers Lasting Powers of Attorney and court appointed deputies and investigates complaints about how an attorney or a deputy is exercising their powers.



## Independent Mental Capacity Advocate Service

### **Does the person need an IMCA...?**

- Does the person have a condition which is affecting their ability to make decisions?
- Is the person facing a decision about serious medical treatment or a change of accommodation?

### **Or are there**

- decisions relating to Adult Protection Proceedings

### **Or**

- A care/accommodation review where it is felt that the person would benefit from IMCA?
- Is the person 16 years or older?
- Does the person lack capacity to make the particular decision?
- Is there nobody (other than paid workers) whom the decision-maker considers are willing and able to be consulted about the decision?

(This does not apply for Adult Protection Proceedings – people can have family and still be eligible).

If you would like to discuss whether a person is eligible for the IMCA service please contact your local IMCA Service.