Mental Capacity Act & Deprivation of Liberty Safeguards Awareness Session
Objectives
by the end of the session you will have an understanding of:

• What is meant by mental capacity
• the five core principles of the Act
• the assessment process for establishing capacity
• best practice in the decision making process
• when restraint and restriction may be lawful under MCA
• Less restriction and how this looks in practice
• restraint and restrictions that may deprive a person of their liberty
• the roles, bodies and powers that support the MCA
• The future of DoLS
Mental Capacity

• Is the ability to make a decision
• Can vary over time
• Can vary on the decision to be made
• Can be affected by external factors
• Assumptions about capacity must not be made because of age, physical appearance, condition or behaviour
Powers and Bodies introduced with the MCA

• The IMCA
• Lasting Power of Attorney
• Court of Protection
• The Public Guardian
• Criminal offence
Who does the MCA 2005 Safeguard?

- Individuals with-
  - Dementia
  - Learning disabilities
  - Brain injury
  - Temporary loss of capacity
  - A desire to plan for the future
Principles of the Mental Capacity Act 2005

1. A person must be assumed to have capacity unless it is established that he lacks

2. A person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken

3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision

4. Anything done for or on behalf of the person must be in his best interests

5. Before making the decision, other less restrictive options should be considered
The assessment of capacity is decision specific—there should be no general statements regarding that a person ‘lacks capacity’ (Section 2(1))

Prompts for assessment-

• The way a person behaves
• Changing circumstances
• Concerns raised by someone else
Test of Capacity

- **Stage 1**
  *Diagnostic test*

  Is there an impairment in the *functioning of mind or brain*?

- **Stage 2**
  *Functional test*

  (Is that impairment impacting upon the person’s ability to make this specific decision)

- **Understand** – *information relevant to the decision*
- **Retain**
- **Weigh up**
- **Communicate**
Best Practice

• Day to day assessment may involve relatively informal decisions, in daily records, but must be written down to show application of core principles

• More complex decisions, with potentially serious consequences, will require more formal assessment and recording
Section 5 of the Act....

...allows necessary caring acts or treatment to be carried out ....with protection from liability.....with no need to get formal authority to act

Section 6 of the Act....

...imposes some important limitations on acts........key areas where practice may be unlawful....inappropriate use of restraint....depriving a person of their liberty
Restraint - Lawful under section 6 of the MCA if:

• Necessary to prevent harm to the person

• Proportionate to the likelihood and seriousness of the harm

• In line with the rest of the Act restraint must be in the person’s best interests and a less restrictive alternative considered

• Careful consideration needs to be given to whether restrictions placed on a person go beyond restraint and actually deprive them of liberty and, if so, whether those restrictions are genuinely necessary.
What is the decision?

What are the options?

Who makes the decision?

- The family carer
- The doctor
- The nurse or paid carer
- Lasting Power of Attorney
- The Deputy
Making a Best Interest Decision

Consider the options and weigh up the pro’s and con’s

- Encourage participation
- Identify all relevant circumstances
- Find out the person’s views
- Avoid discrimination
- Assess whether the person may regain capacity
- Consult others
- Life sustaining treatment
- Least restrictive decision

Is the person happy? (consider emotional well being)
- this would be a defensible position for the decision maker
What is a deprivation?

• No definition
• Underpinned by Case Law

Remember - Human Rights are universal and liberty means the same for all...

Ask yourself:

‘if this would deprive me of my liberty then it deprives another also’
Deprivation of Liberty … or not?

Two key questions to ask…( the ‘acid test’)

• Is the person subject to **continuous supervision** and **control**?
• Is the person **free to leave**?

NB. Compliance, lack of objection, reason or purpose are **NOT** relevant

• The intention of the Supreme Court is to extend the safeguard of independent scrutiny

Supreme Court judgement (2014) in the case of ‘P v Cheshire West and Chester and another’ and P and Q v Surrey County Council
Deprivation and potential breach of other Human Rights

- Article 3
- Article 6
- Article 8

NB: Lawfully depriving someone of their liberty does not resolve article 8 disputes

Human Rights Act 1998
Separate the Question...

- Whether the restrictions amount to a deprivation of liberty
  and
- Whether staff actions are necessary, proportionate and in the persons best interest

*The former determines whether the situation must be assessed independently*
The Process for Authorising a Deprivation of Liberty

- **Urgent Authorisation**
  Care home or hospital (MA) grants itself –valid for 7 days

- **Application for Standard Authorisation**
  Managing Authority applies to the **Supervisory Body** if the Individual is at risk of DoL within 28 days

- **The Supervisory Body instructs 2 Assessors** – they will undertake 6 assessments
The Assessment Process

- Is the service user 18 or over (or will be within 28 days)?
  - No: Consider Children Act or MHA
  - Yes: Definition of Mental Disorder in MHA 1983 but without special provisions for LD
- Mental Health
  - No: Deprivation of Liberty not possible under ECHR
  - Yes: If SU has capacity, they can decide on the arrangements
- Mental Capacity
  - No: Use Mental Health Act
  - Yes: Advance decision or decision of Attorney is binding
- Eligibility: S12
  - No: Alternative arrangements need to be made
  - Yes: Supervisory body grants authorisation for up to one year, with/without conditions
- No Refusals
  - Yes: Managing Authority and Supervisory Body have duty to review
- Best Interests
  - No: Consider all circumstances including care plan, consult, involve SU. Are criteria for deprivation met?
  - Yes: Approved Doctor

Who Can Do What?
- Approved Doctor
- Best Interests Assessor
<table>
<thead>
<tr>
<th>Individual does not object to the proposed accommodation in a hospital for care and/or treatment they will receive there for mental disorder</th>
<th>Individual objects to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for mental disorder</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual has the capacity to consent to being accommodated in a hospital for care and/or treatment</td>
<td>Only MHA available</td>
</tr>
<tr>
<td>Individual lacks the capacity to consent to being accommodated in a hospital for care and/or treatment</td>
<td>Only MHA</td>
</tr>
</tbody>
</table>
The Future of DoLS – an overview

Why is there a need for change?

Criticism of DoLS – its complexity, scale of the problem post-Cheshire West, “one-size-fits-all” approach

The Law Commission produced report for consultation – closed October 2015
Final Report and draft bill by end 2016

The Law Commission’s provisionally titled ‘protective care’, covers care homes, hospitals, supported living, shared lives and domestic settings. The nature and extent of the safeguards offered by the system vary according to the care setting and level of restrictions proposed. Includes ‘supportive care’ and ‘restrictive care’. Includes a hospital and palliative care scheme
MCA Summary

What is the decision?

Apply the statutory principles (Section 1)

Assessment of Capacity (Sections 2 & 3)

Assessment of Best Interests (Section 4)

Act in Persons Best Interests (Section 5)

If individual has capacity then they make an autonomous decision

No restraint is required (S5) Some restraint is required (S6) \(\leftrightarrow\) Deprivation of Liberty (DoLS)

Ongoing Review
Your Questions

Thank You