



Mental Capacity Act & Deprivation of Liberty Awareness Session



What do you want/need from this 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**
- **Supported decision making**
- **The assessment process for establishing capacity**
- **Best practice in the decision making process**
- **When restraint and restriction may be lawful under MCA**
- **Deprivation of liberty under MCA**
- **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

Supported Decision Making

- Working on the assumption of capacity
- Be clear about the decision
- Practicable steps
- Know the options available to the person
- Provide relevant information to the person in a way that they can understand
- The above precedes any assessment of capacity
- The response from/ engagement with the individual may prompt an assessment

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*

Good Practice in Assessment of Mental Capacity

- Prepare (consider executive dysfunction)
- Tell the person why you are there
- Know what options are available to the person before the assessment
- Provide information/ ascertain what the person already knows...don't 'test' knowledge...if necessary give information and then determine understanding of that information
- Consider the person's responses to questions posed and record them
- Reflect and ensure that you could explain how and where questions were put to the person- and what effort you made to ensure the person understood the information
- Supplement assessment with observation and reliable contemporaneous evidence
- Do not provide an opinion unless it is supported by a fact

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

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

**Consider in
advance !**

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

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 a deprivation?

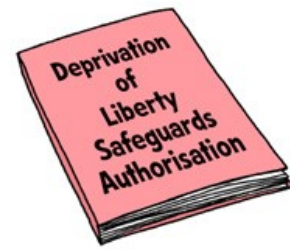
- No definition
- Underpinned by Case Law

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*

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 (LA) if the Individual is at risk of DoL within 28 days

- *The Supervisory Body instructs 2 Assessors –*

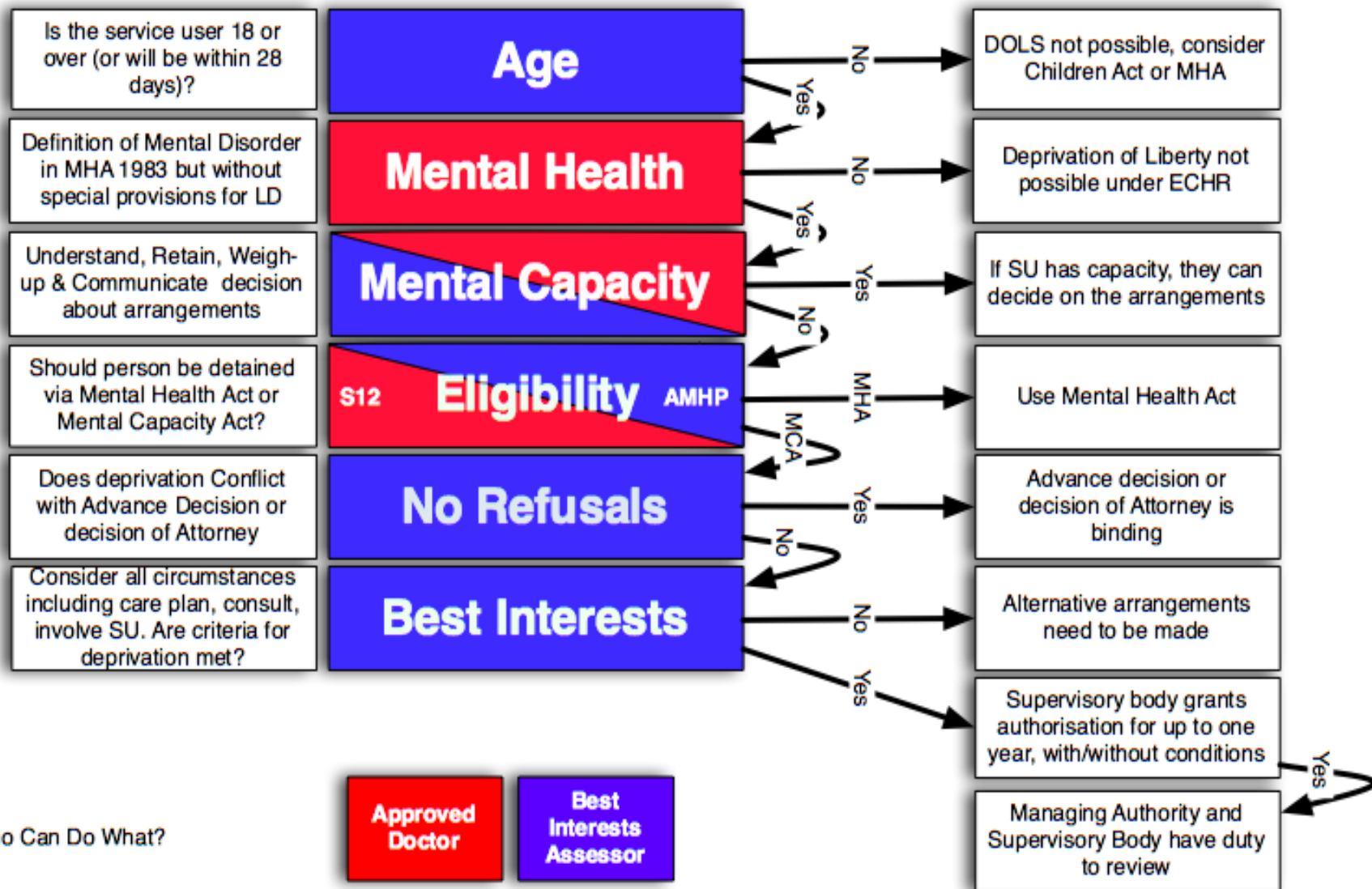
they will undertake 6 assessments

**Deprivation in a community
setting?**



Application to the Court of
Protection for Authorisation
CoP DoL 11

The Assessment Process





Mental Capacity (Amendment) Act 2019

DoLS is going to be replaced by the Liberty
Protection Safeguards.....

www.gov.uk

Your Questions



Thank You