

# Mental Capacity Act and Deprivation of Liberty Safeguards Policy

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# Mental Capacity Act (MCA) and Deprivation of Liberty Safeguards (DoLS) Policy

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## Introduction

The purpose of this policy is to support the organisation in understanding and in its ability to apply the principles of the Mental Capacity Act (MCA) Code of Practice, and DoLS (Deprivation of Liberty Safeguards) Code of Practice, so Banquo Limited can be assured that assessments of capacity to make decisions are carried out appropriately by our service and that decisions made on behalf of people who lack capacity to make those decisions are made in their best interests.

The Mental Capacity Act provides a framework to empower and protect vulnerable people who may not be able to make their own decisions due to illness, injury or disability. The MCA is clear who is able to make decisions on behalf of others, in what situations, what the process would be, and how to plan ahead if at some stage of their life a person was assessed as lacking the capacity to make a certain decision for themselves.

In following the principles of the MCA Banquo Limited aims to ensure that staff put the person at the centre of any decision-making processes and support service users to make their own decisions where they have the capacity to do so.

The MCA applies to all people over the age of 16 across England and Wales, with the exception of making a lasting power of attorney (LPA); making an advance decision to refuse treatment (ADRT) and being authorised under the Deprivation of Liberty Safeguards (DoLS); in these situations, the Act applies when a person is aged 18 or over.

The Act also introduces a number of bodies and regulations that staff must be aware of including:

- The Independent Mental Capacity Advocate
- The Office of the Public Guardian
- The Court of Protection
- Advance Decisions to refuse treatment
- Lasting Powers of Attorneys

The MCA provides legal protection from liability for carrying out certain actions in connection with care and treatment of people provided that :

- The principles of the MCA are observed,
- A full assessment of capacity has been made at it is reasonably believed that the person lacks capacity in relation to the matter in question,
- There is a reasonable belief the action taken is in the best interests of the person.

The registered manager must ensure that staff are made aware of this policy and how to access it and ensure its implementation within their line of responsibility and accountability.

## Scope

This policy applies to all staff working for Banquo Limited involved in the care or support of service users over the age of 16 years living in England and Wales who are assessed as unable to make all or some decisions for themselves.

This policy also applies to any agency, self-employed or temporary staff or volunteers carrying out work on behalf of Banquo Limited.

## Accountabilities & Responsibilities

Overall accountability for ensuring that there are systems and processes to effectively manage the roles and responsibilities for the organisation in respect of the Mental Capacity Act (MCA) and Deprivation of Liberty Safeguards (DoLS) lies with the Registered Manager.

The Registered Manager has overall responsibility for:

- Overseeing the policy
- Implementing the policy

Staff Responsibilities of Staff (including all employees, whether full/part time, agency, bank or volunteers) are:

- Implementing the policy

## The Five Principles of the Mental Capacity Act

All staff employed by Banquo Limited will have a good understanding of the MCA and follow the principles laid out in the act.

The five principles listed below must underpin all decision making:

- Principle 1: Always assume the person is able to make the decision until you have proof they are not.
- Principle 2: Support the person to make the decision as much as possible.
- Principle 3: Respect the person's right to make an unwise decision if they demonstrate they have the capacity to do so.
- Principle 4: If the person is assessed as lacking capacity, make the decision in their best interests.
- Principle 5: Choose the least restrictive option that achieves the purpose of the decision.

Staff at Banquo Limited will always ensure that service users are supported and encouraged to make decisions for themselves. They will do this by:

- Ensuring the service user has all the relevant information available to make an informed decision
- Giving the service user access to information in ways that they will understand ie easy read format, pictures, sign language etc

- Ensuring the information is presented to the service user at a suitable time of day for them ie not when they are over tired or not fully awake
- Making sure the service user has access to any support from a person either of their choosing or that is known to be able to help maximise their level of understanding

## Assessing Capacity

There are a variety of situations which could lead staff to question a person's capacity to make a decision:

- the person's behaviour or circumstances cause doubt as to whether they have the capacity to make a decision
- someone else says they are concerned about the person's capacity
- the person has previously been diagnosed with an impairment or disturbance of mind and there is evidence to show they lack capacity to make other decisions in their life.

When carrying out a capacity assessment the assessment should always be time and decision specific. The person carrying out the assessment must consider the following:

If the need to carry out a capacity assessment is identified the following functionality test may be used:

- Determine whether the patient has an impairment of, or disturbance in, the functioning of their mind or brain?
  - If the answer is 'no' then the individual does not lack capacity under the terms of the Mental Capacity Act 2005.
  - If the answer is 'yes' then the individual may lack capacity in certain and specific decision-making.
- Secondly, determine whether there is impairment or disturbance sufficient enough that the person lacks the capacity to make a particular decision. This will be decided through the completion of a mental capacity assessment in which all the information around the decision needing to be made is presented to the individual who needs to make the decision. For the individual to be deemed to have mental capacity around the specific decision, they must be able to do the following four things:
  - Understand the information that is given to them.
  - Retain the information long enough to be able to make the decision.
  - Weigh up the information using the pros and cons of their choices.
  - Communicate their decision (this can be verbally or non-verbally).

For some people, their ability to meet some or all of these criteria will fluctuate over time and it is therefore important that abilities to make decisions are reviewed regularly.

An individual may be competent to make basic decisions (ie what to eat or wear), but at the same time not have the capacity to make other, more complex decisions (ie where to live and decisions relating to care).

If a person is assessed as lacking capacity they may be denied their right to make a specific decision if that decision is deemed to be not in their best interest or likely to cause harm.

## **Who should assess Capacity?**

All employees working at Banquo Limited have training in the Mental Capacity Act 2005. The person making the decision is known as the 'decision maker' and normally will be the person directly involved in an intervention. Alternatively, it may be a professional such as a doctor, nurse or social worker where decisions about treatment, care arrangements or accommodation need to be made.

Any person carrying out a capacity assessment must be able to justify any conclusions they come to which could effect the individual in question.

## **Best Interests Decisions**

Any action taken, or decision made for someone assessed as lacking capacity to make that decision must be made in his or her best interests. There are key factors to consider when determining what is in a person's best interests:

- consideration of whether the service user is likely to regain capacity and whether the decision can wait until then
- consideration of all the relevant circumstances relating to the decision in question
- the individual's past and present wishes and feelings
- an advanced directive if valid and relevant
- any beliefs or values (religious, cultural and/or moral) that might influence the decision
- the views of others, such as carers, close relatives or friends or anyone else interested in the persons welfare, any attorney appointed under a Lasting Power of Attorney and/or any deputy appointed by the Court of Protection to make decisions for that person.

Examples of Best Interest decisions may include:

- Giving covert medication
- Restraint physical mental
- Dispute with family
- Change of accommodation
- Changes to care and treatment

## **Advanced Decisions**

If a person (who lacks capacity) made an advanced decision to refuse medical treatment at a time when he / she had capacity. This will prevent a healthcare professional from giving him / her the same treatment in his / her best interest as long as the advanced decision valid and applicable to present circumstances.

Advanced care planning is a process by which people can plan ahead to make decisions and express preferences about what they wish to happen with their care and treatment if

they lost capacity to make decisions for themselves and other people to make decisions for them. They can:

- Appoint someone to make decisions for them regarding health and welfare via a Last Power of Attorney authorisation
- Refuse specific treatments in advance if they want to be making an advanced decision to refuse treatment.
- They can nominate people they would like to be consulted when decisions are being made about them.

Individuals can write down a statement containing their wishes and preferences for their future care but may also have made a verbal decision. However, assurance must always be sought to ensure such decisions (written or verbal) are valid and applicable.

For further detail around advanced decisions, please see chapter 9 [Mental Capacity Act Code of Practice - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice)

## **Lasting Power of Attorney**

The act allows a person who is aged 18 and over who has capacity to appoint an attorney to act on their behalf should they lose capacity to make decisions in the future. There are two types:

- appointing someone to make health and welfare decisions on their behalf which may involve treatment and placements to assist with care
- appointing someone to make financial and property decisions.

Employees at Banquo Limited should always be aware of any Lasting Power of Attorney in place for the people they are caring for, including who the attorneys are and what decisions they are able to make. Documentation must be sought to verify attorneys and checks made at the Office of Public Guardian. This will be discussed during the initial assessment before support commences.

## **Deprivation of Liberty Safeguards (DoLS)**

Deprivation of liberty can mean that an individual is not free to go anywhere without permission or close supervision. It may also mean that they have to be continuously supervised. This is against the law unless it's done under the rules of the Mental Capacity Act.

A person may also be being deprived of their liberty if there is:

- frequent use of sedation or medication to control behaviour
- regular use of physical restraint to control behaviour
- the person concerned objects verbally or physically to the restriction and/or restraint
- objections from family and/or friends to the restriction and/or restraint
- the person is confined to a particular part of the establishment in which they are being cared for
- the placement is potentially unstable

- possible challenge to the restriction and restraint by the Court of Protection or the Ombudsman, a letter of complaint or solicitor's letter
- the person is already subject to a deprivation of liberty authorisation that is about to expire.

A deprivation of liberty should only be used if it's the least restrictive way of keeping a person safe or making sure that they have the right medical treatment.

Banquo Limited understands that a person who is living in their own home can still be deprived of their liberty. This could be if the service user is receiving a lot of care and support and are deemed as being be under 'continuous supervision and control'.

If a person is living in their own home, a deprivation of liberty will still need to be authorised. The point of the authorisation is the same as in a care home or hospital, and the same criteria apply. However, the process is slightly different.

In order to authorise a deprivation of liberty, Banquo Limited will inform the local authority or Integrated Care Board who will need to take the case to the Court of Protection.

If the authorisation is granted then it can last for up to one year. It can be returned to court earlier if The arrangements become more restrictive, the service user regains capacity or if someone believes that the arrangements are no longer in the service users best interests.

Within a domiciliary setting the Court of Protection can be used to lawfully deprive a service user of their liberty if:

- They are age 16 or over
- They have been assessed as lacking capacity to agree to the

restrictions **The 6 assessments**

A service user cannot have their liberty taken away unless all the 6 assessments are met. These are:

1. An age assessment, to make sure that they are aged 18 or over.
2. A mental health assessment to confirm that they have been diagnosed with a 'mental disorder' within the meaning of the Mental Health Act.
3. A mental capacity assessment to see whether they have capacity to decide where their accommodation should be. If they do have the capacity too make this decision, they shouldn't be deprived of their liberty and the authorisation procedure shouldn't go ahead.
4. A best interest's assessment to see whether they are being, or are going to be, deprived of your liberty. And to assess whether this is in their best interests. This should consider the service users values and any views they have expressed in the past. It will also consider the views of their friends, family, informal carers and any professionals involved in their care.
5. An eligibility assessment to confirm that they are not detained under the Mental Health Act 1983. And that they are not subject to a requirement that would conflict with the



Deprivation of Liberty Safeguards. This includes being required to live somewhere else under Mental Health Act guardianship.

6. A 'no refusals' assessment to make sure that the deprivation of liberty doesn't conflict with any advance decisions they have made. Or conflict with the decision of an attorney under a lasting power of attorney, or a deputy appointed by the Court of Protection.

### **Breakaway and Restraint**

Banquo Limited does not advocate or train employees in the use of restraint and does not foresee it being a likely or regular occurrence. Banquo Limited does however acknowledge employees have a legal right to defend themselves from assault and protect the safety of colleagues, visitors and those around them. Banquo Limited also acknowledges employees may in rare circumstances intervene in the best interests of its service users to prevent instances of self-harm. Any intervention should always be reasonable, proportionate and the least restrictive option. In the event of any instance of physical intervention (an employee making physical contact with a patient without their prior consent) the Management Team of Banquo Limited will review whether more formal training is needed.

### **Monitoring**

To ensure this policy remains both practical and current, regular auditing processes will take place. Individual incidents will be monitored via the incident reporting system and themes and trends reported to the Management Team.

Any adverse issues or poor service user outcomes related to this policy will be investigated and immediate change implemented where required.

### **Related Policies and Procedures**

Consent Policy

Safeguarding Policies

Advanced Care Planning Policy

Incident Management Policy

Training and Development Policy

### **Related Legislation and Guidance**

Care Act 2014

Health and Social Care Act 2008 (Regulated Activities) regulations 2014

Human Rights Act 1998

Mental Capacity Act 2005

Mental Capacity Act Code of Practice

Social Care Institute for Excellence - <https://www.scie.org.uk/mca/dols/at-a-glance>

Mind (2024) [Deprivation of liberty - Mind](#)

Office of the Public Guardian (2020) [Mental Capacity Act Code of Practice - GOV.UK \(www.gov.uk\)](#)