

Mental capacity act including the deprivation of liberty safeguards

An improvement tool

Mental Capacity Act – improvement tool

This improvement tool has been developed throughout 2014/15 with funding from the Department of Health and support from the Local Government Association (LGA) and the Association of Directors of Social Services (ADASS). Developed by the sector, the key areas of focus below have been used in a number of peer challenges and as a means of self-assessment. The characteristics of a well-performing and ambitious organisation are described.

The tool can now be used across a range of organisation to assess a service, to identify and promote good practice and to highlight areas for further development.

There are four main themes and several areas within each theme. These areas to question relate to both council and partners, particularly the NHS and social care providers. The tool contains suggestions for where evidence can best be obtained.

Throughout the document those areas to question which apply exclusively to the Deprivation of Liberty Safeguards (DoLS) are shown in bold type, however there are others which will apply across Deprivation of Liberty Safeguards DoLS and the Mental Capacity Act (MCA).

The tool was developed by Lorraine Currie, MCA lead for ADASS.

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Improvement tool for Mental Capacity Act and Deprivation of Liberty Safeguards (MCA and DoLS).

The tool is grouped into four main themes, which are divided into sub themes.

Themes	A: Outcomes and experiences	B: Leadership, strategy and commissioning	C: Service delivery, effective practice and performance and resource management	D: Working together
Elements	<p>1) Outcomes</p> <p>2) People’s experiences of MCA and DoLS</p> <p>This theme looks at what difference in outcomes there are for people who lack capacity and people subject to a DoLS. It also looks at the experiences of people who lack capacity with the services provided.</p>	<p>3) Leadership</p> <p>4) Strategy</p> <p>5) Commissioning</p> <p>This theme looks at the overall vision for MCA including DoLS, the strategy that is used to achieve that vision and how this is led and commissioned.</p>	<p>6) Service delivery and effective practice</p> <p>7) Performance and resource management</p> <p>This theme looks at service delivery, the effectiveness of practice and how the performance and resources of the services, including their people, are managed.</p>	<p>8) Partnerships</p> <p>This theme looks at the role and performance of partnerships, including the Health and Wellbeing and Safeguarding Adults Boards and how all partners work together to ensure high quality services and outcomes.</p>

These areas to question relate to both council and partners (particularly the NHS and social care providers).

A: Outcomes for and the experiences of people who use services

Outcomes: The ideal service:

1.1 The rights¹ of people who lack capacity are effectively safeguarded in the community, in care homes and hospitals.

1.2 The partners' approach to commissioning and providing services clearly has an MCA outcome based focus.

1.3 People are supported to identify and realise positive outcomes in relation to their finances, accommodation, safety, relationships and health and wellbeing

Areas to question	Achievements/ strengths	Current developments/ work in progress	Areas of challenge/further consideration	Possible sources of evidence
<p>There is a shared approach to MCA outcomes and the promotion of the rights of people who may lack capacity with the council, NHS, providers, the Office of the Public Guardian, the Court of Protection, police and other partners</p>				<ul style="list-style-type: none"> • There is an emphasis on MCA including DoLS and achieving good outcomes throughout all strategies, plans and progress reporting and in interviews • Focus group with people who use services and their families • Interviews with IMCAs and RPRs • Performance reporting includes MCA outcomes measures • Case files and audits • Audits of DoLS cases and audits of BIA reports

<p>The public is becoming increasingly aware of the MCA, of the rights of those who may lack capacity, of the tools to prepare for a lack of capacity (LPAs and Advance decisions to refuse treatment)s</p>				<ul style="list-style-type: none"> • Health and wellbeing or safeguarding adults board (SAB) reports. • Board level reports, including to the council, Clinical Commissioning Group CCG and NHS trusts
<p>The public is becoming increasingly aware of the DoLS; of the rights of those who may lack capacity, of the role and responsibilities of Relevant Persons Representatives</p>				
<p>Outcomes are consistent, regardless of age, disability or mental health problems, who pays for their care and their Fair Access to Care Services (FACS) eligibility criteria</p>				
<p>Partners and providers are able to demonstrate that they use MCA to safeguard people's rights.</p>				
<p>Partners and providers are able to demonstrate that they use DoLS to safeguard people's rights.</p>				

The LA is able to demonstrate its actions in relation to those who may be deprived of liberty in settings other than hospitals and care homes.				
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2. Peoples experience of MCA including DoLS: The ideal service

2.1 Partner organisations can have positive experiences from people who lack capacity and their family/friends/advocates.

2.2 Partners engage people (with mental impairments and their family/friends/advocates) on the design, monitoring and evaluation of services. They pro-actively seek out the wishes and feelings of people.

2.3 Delivery accords with the public sector Equality Duty

Areas to question	Achievements /strengths	Current developments/ work in progress	Areas of challenge/further consideration	Possible sources of evidence
People who are supported to make decisions using MCA are treated sensitively and with dignity and respect				<ul style="list-style-type: none"> • Practice observation • Interviews with IMCAs. RPRs and/or focus group with people who use services and carers. IMCA statistics. • Policies and procedures which seek to identify the wishes and feelings of people who lack capacity. • File audits • Management information • BIA assessments • IMCA Reports • BIA Forum
There is evidence that people who lack capacity experience fair treatment with dignity and respect in the assessment of their needs, in care planning, service provision and in reviews.				
The duty to instruct Independent Mental Capacity Advocates is widely understood and practiced both in social care and for DoLS				

Outcomes are defined by the individuals concerned or through the best interest's decision making process.				
Each organisation has procedures in place to promote autonomy and to ensure that all interventions are proportionate and least restrictive of people's rights				
People experiencing DoLS processes are treated sensitively and with dignity and respect				
The person's wishes and feelings are clearly evident throughout the DoLS process. These are defined by the individuals concerned or by a Best Interest Assessor making clear reference to the use of the statutory checklist				
Best interest assessments take full account of the range of people's circumstances including consultation with family/ friends, in order to draw person centred conclusions.				

<p>Deprivation of liberty safeguards are applied where appropriate and applications are made to the Court of Protection for those in settings other than hospitals and care homes.</p>				
<p>The council and its partners are able to demonstrate that the use of DoLS results in less restrictive care arrangements for people</p>				

Theme B: Leadership, strategy and commissioning

3. Leadership: The ideal service

3.1 There is a recognised and active leadership across organisations in relation to the values underpinning the MCA including DoLS.

3.2 There is recognised and active leadership by the council in relation to its role as the Supervisory Body

Areas to question	Achievements /strengths	Current developments/ work in progress	Areas of challenge/further consideration	Possible sources of evidence
Senior councillors, non-executives and key senior managers and officers communicate how MCA principles and duties contributes to the wellbeing of individuals and communities				<ul style="list-style-type: none"> • Leadership responsibilities in relation to MCA and DoLS have been allocated • Cabinet, scrutiny, and NHS boards commission, received, and engage with progress with MCA compliance (eg MCA audits and MCA trained workforce planning) • CQC and local Healthwatch reports address MCA issues. • Stated cross-party support for the improvement of MCA including DoLS
Senior councillors, non-executives and key senior managers and officers communicate how DoLS principles and duties contributes to the wellbeing of individuals and communities				
There is joint and coordinated leadership with and by other key partners, including the CCG and NHS Trust designated MCA leads				

<p>Managers and leaders communicate clearly the requirements of the DoLS (how to support people with mental impairments to make decisions, when to carry out capacity assessments, best interests decisions, how to balance autonomy with risk and when interventions are (and are not) proportionate).</p>				<ul style="list-style-type: none"> • Minutes of the health and wellbeing board, SAB, Community Safety Partnership etc have evidenced an interest in MCA practice. • Examples of support and training for leaders; of regular managers' briefing on case law; or staff consulting lawyers providing clear advice based on current case law.
<p>Officers are knowledgeable about MCA and DoLS and keep abreast of local and national developments and learning, and case law.</p>				<ul style="list-style-type: none"> • There is clear evidence of scrutiny by DoLS authorisers provided on the Standard Authorisation such as addition of conditions, variation of time scales and.
<p>Partners actively champions the key principles as set out in the public sector equality duties on age, race, gender and disability</p>				<ul style="list-style-type: none"> • DoLS authorisers attend regular training and are kept up-to-date on case law.
<p>Leaders are supported by appropriate training and have arrangements for regular briefing on case law from Court of Protection.</p>				

<p>All Staff are familiar with the five guiding principles of MCA and understand how to be compliant with the MCA and know when decisions need to be referred to the Court of Protection.</p>				
<p>The role of DoLS authoriser is fully incorporated into the overall DoLS process.</p>				
<p>Authorisers are at an appropriately senior level within the organisation and provide strategic leadership oversight and scrutiny.</p>				
<p>There is clear leadership of the process for applications to the Court of Protection for 'Community DoL's' (this means applications for those deprived of liberty in all settings which are not care homes or hospitals included a persons own home)</p>				

4. Strategy: The ideal service

4.1 The high level strategy of the council and the NHS recognises that people with mental impairments are a large and growing proportion of their business²

4.2 The council and NHS have a clear vision, priorities, strategies and plans for ensuring that all their services and commissioning are MCA including DoLS compliant and this is shared with key partners including the providers and G.Ps

Areas to question	Achievements/strengths	Current developments/ work in progress	Areas of challenge/further consideration	Possible sources of evidence
The vision underpinning social care and health care for adults recognises the skills and training needed to work with people who lack capacity.				<ul style="list-style-type: none"> • Corporate, adult social care and partners' strategies and plans • Commissioning and contracting documentation
The Adult safeguarding policy is informed by the MCA. It aims to balance protection with autonomy. All staff involved in assessment, care planning and safeguarding are MCA trained?				<ul style="list-style-type: none"> • SAB reports and Safeguarding policy • SAB Memorandum of Understanding • Policies and procedures

<p>The Adult safeguarding policy is informed by the DoLS. The policy includes clear guidance about unauthorised DoLS and when this may become a safeguarding issue. It aims to balance protection with autonomy. All staff involved in assessment, care planning and safeguarding are trained about DoLS.</p>				<ul style="list-style-type: none"> • The vision is articulated by the leaders and all employees across the Council and by its partner organisations • Joint Strategic Needs Assessment (JSNA) • Workforce strategy and training plans
<p>There is a Joint Strategic Needs Assessment with robust information about the needs of the full range of vulnerable adults</p>				
<p>The council and NHS know what the views and experiences of people who have used services and who lack capacity are and have incorporated these in its vision, strategies, plans and priorities. These are also incorporated into commissioning processes</p>				

5. Commissioning: The ideal service

5.1 The council and its partners only commission MCA compliant services, which recognise rights.

5.2 The council and its partners have developed mechanisms for people who are organising their own support and services to manage risks and benefits

Areas to question	Achievements/strengths	Current developments/ work in progress	Areas of challenge/further consideration	Possible sources of evidence
Commissioning and contracting (by the council and NHS) sets out quality assurance and service standards that build on MCA. Clear expectations and reporting requirements are placed on providers				<ul style="list-style-type: none"> • Specifications and contract monitoring • Policies or protocols that focus on dignity and respect • Management and SAB reports
The duties of commissioners and providers are clear and evidenced and the Court of Protection is used in settling disputes.				<ul style="list-style-type: none"> • Case files • Provider contracts • DoLS application records • Monthly Safeguarding Performance Summary
Commissioning and contracting with regulated providers includes Care Quality Commission (CQC) registration guidance in relation to MCA including DoLS				<ul style="list-style-type: none"> • Forums/ meetings • Focus group with providers • IMCA tender documents and selection criteria

<p>IMCA services are commissioned with a clear focus on quality as well as cost and consideration is given to commissioning them outside of the statutory role.</p>				
<p>DoLS referrals are tracked across providers and possible under or over reporting patterns addressed.</p>				
<p>Contract monitoring has a focus on MCA compliance and on the application of the DoLS including monitoring compliance with conditions and addresses any shortfalls.</p>				

Theme C: Service delivery, performance and resource management

6. Service delivery: The ideal service

6.1 The council, NHS, police and other partners have robust and effective service delivery that ensures that an understanding of MCA is embedded throughout organisations.

6.2 It is clear that the five principles of the MCA and Best Interests decision making are embedded in practice for all individuals from the age of 16 years.

6.3 Care and health services ‘put people first’ and promote their rights under the Mental Capacity Act.

6.4 Services have MCA leads available to provide support and advice.

6.5 There is explicit involvement, training and, awareness raising of service users and the public

Areas to question	Achievements/strengths	Current developments/ work in progress	Areas of challenge/further consideration	Possible sources of evidence
The council, NHS, Police and other partners can clearly demonstrate good policies, practices and procedures in the delivery of MCA, which embed the 5 principles into practice.				<ul style="list-style-type: none"> • Observation of initial contact services • Observation of capacity assessments and best interest decisions • Safeguarding adult policy and procedures / MCA policy, guidance and procedural framework and the awareness and utilisation of them by staff • Guidance for staff and partners (including such tools as flow charts) • Information and advice for the public

These policy and procedures are understood and followed by all professionals and by staff at all levels				<ul style="list-style-type: none"> • File audits (demonstrating evidence of supported decision making; assessments of capacity, best interests decisions; family/IMCA involvement; MCA compliant care plans) • Interviews with service users and their families/ carers • Any staff surveys • Staff views of support from MCA including DoLS and safeguarding specialists • Office of the Public Guardian (OPG) and Court of Protection papers • Evidence of MCA including DoLS compliance with safeguarding adult cases • Evidence that MCA specialists and or lawyers disseminate learning from Court of Protection case law.
Providers, the voluntary sector, all council and partner staff are clear about the limitations of their ability to intervene in people's lives, and be able to seek legal advice where needed.				
people who fund their own services are enabled to understand and work within the MCA				
Providers have clear access to information and advice and are responded to effectively				
Providers receive regular updates in relation to the DoLS and are clear about the implications of any changes to case law.				
Professionals understand and respond to people whose capacity fluctuates.				

<p>Professionals demonstrate the ability to make sound decision and time specific assessments of capacity in order to support decisions that are in the individual's best interests.</p>				<ul style="list-style-type: none"> • Evidence that staff are encouraged to seek legal advice and receive it in a timely manner • Evidence that any feedback from the Court has led to learning in the LA • Focus groups with relatives. • Training material
<p>Safeguarding staff are aware of and respond to people in circumstances where their ability to make a decision is compromised because of the undue influence of an individual or environment.</p>				
<p>Safeguarding is MCA compliant; all staff involved in safeguarding are MCA trained and understand what 'intervention that is less restrictive of people's rights' mean.</p>				
<p>Care and protection plans are clearly based on MCA principles and incorporate requirements for monitoring and review. All applications for funding care plans where the person lacks capacity to make the decision are fully supported with capacity assessments and best interest decisions.</p>				

There are regular care plan reviews that identify any potential MCA concerns				
There are regular care plan reviews that identify any potential deprivation of liberty whether in care homes, hospitals or community settings.				
There is no compulsion for any course of action except within the framework of the law, including the Mental Health and Mental Capacity Acts				
Staff are clear about the MCA and the MHA interface and know when to seek further specialist advice				
Staff are aware of the limits of the MCA and when an application to the Court of Protection may be needed and use The Office of the Public Guardian appropriately to safeguard people's rights				

Information sharing protocols are clear so that information is shared appropriately across agencies. Information sharing behaviour is consistent with the protocols.				
Where people self-neglect appropriate consideration is given to their capacity in decision making and staff are aware of both the range of and the limitations of the legal powers available to them.				
The council, NHS, Police and other partners can clearly demonstrate good policies, practices and procedures in the relation to implementing the DoLS and can demonstrate that staff know how to identify a possible deprivation of liberty and how to respond.				
Professionals are able to challenge risk averse practice particularly in relation to deprivation of liberty in order to promote dignity, autonomy and choice				

7. Performance and resource management: The ideal service

7.1 Services are held accountable for performance and quality, with a focus on outcomes, needs and rights of people who lack capacity.

7.2 There are sufficient, knowledgeable and skilled staff employed in all organisations or commissioned from external organisations to efficiently and effectively deliver the requirements of MCA

7.3 There is sufficient resources available to train and equip staff to provide an effective service.

7.4 there are sufficient IMCA and Advocacy services, to support, involve and empower service users and carers.

Areas to question	Achievements/strengths	Current developments/ work in progress	Areas of challenge/further consideration	Possible sources of evidence
There is a practice and performance management framework that runs across council and partner agency functions and which looks at regional and national variations in practice in relation to MCA implementation.				<ul style="list-style-type: none"> • A suite of indicators including quantitative and qualitative measures of performance that is reported regularly to senior and team managers • Summaries of training activity • Skills and confidence as demonstrated in interviews and through file audits • Overview and scrutiny agendas and reports with evidence of follow up • Safeguarding adult review protocol • Quality assurance framework • OSC report
Quality assurance systems incorporate MCA and risk management, together with improved outcomes for people				
Local workforce and training plans provide sufficient people with the right skills for MCA.				

<p>There are mechanisms to enable staff to share risk and difficult decision making on a professional basis and to consider risk in the contexts of autonomy, liberty and right to family life.</p>				
<p>All staff have regular supervision that facilitates good decision making support and an appraisal scheme that operates at all levels and which addresses development and performance; both include 'working with people who lack capacity'.</p>				
<p>There is cross-sector training and development including equality awareness training</p>				
<p>There is a range of systems that improve the quality of services on the front line, including through quality assurance, performance reporting mechanisms</p>				
<p>A learning culture is evident. Partners learn from both best practice and from things that don't go well. Case law from the Court of Protection is used as the basis of learning and improvement</p>				

<p>Arrangements for the role and process of overview and scrutiny are clear and effective, with council resources devoted to it to ensure effectiveness of services and partnerships for people who lack, or may lack, capacity.</p>				
<p>There is a practice and performance management framework that runs across council and partner agency functions and which looks at regional and national variations in practice in relation to the deprivation of liberty safeguards</p>				

Theme D: Working together

8. Working together: The ideal service

8.1 There is multi-agency commitment from all partners (senior executives, non-executives, councillors and others from the key partners, including commissioners, regulators, providers and organisations representing disabled and older people and patient and public interests) to embed the MCA in practice and safeguard the rights of people who lack capacity.

8.2. The Boards are satisfied that partners commission and deliver care and support which is compliant with MCA.

8.3 The multiagency partnership is satisfied that MCA is proportionately used to balance prevention from harm with positive risk taking, choice and autonomy.

Areas to question	Achievements/strengths	Current developments/ work in progress	Areas of challenge/further consideration	Possible sources of evidence
There is a clear arrangement for coordinating the work of partners in relation to people who lack capacity (for example, a Safeguarding Board that demonstrates effective leadership and manages the delivery of MCA policy and practice across all agencies, with representatives that are sufficiently senior to get things done)				<p>SAB and HWB reports and minutes</p> <p>Council executive and scrutiny reports and minutes</p> <p>NHS Trust, CCG, Police Authority and other board papers and minutes</p> <p>Interviews and focus groups</p>

<p>There is a clear arrangement for co-ordinating the work of partners in relation to people who the DoLS (for example, a Safeguarding Board that demonstrates effective leadership and manages and monitors the delivery of DoLS policy and practice across all agencies, with representatives that are sufficiently senior to get things done</p>				
<p>Partners provide challenge and support on the outcomes for and experiences of people needing services and the impact and effectiveness of service delivery to its member organisations</p>				
<p>Work has taken place across public and commercial sector bodies to raise awareness of the abuse of people who lack capacity and to safeguard their financial and health and welfare interests</p>				

There are mechanisms in place to ensure that the views of people who are in situations that make them vulnerable, and carers, inform the work of the boards				
Partners work in an atmosphere and culture of co-operation				
There is multi agency analysis of trends and data in relation to the use of the deprivation of liberty safeguards				

1 Throughout this Improvement Tool, 'rights' particularly means the rights to liberty, autonomy and family life, and to the freedom from inhuman and degrading treatment

2 DH report that nationally this is some 70% of people who have council funded social care and some 40% of people receiving hospital care nationally



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