NHS England

Mental Capacity Act Prompt Cards

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NHS ENGLAND INFORMATION READER BOX

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Foreword

The Mental Capacity Act is a visionary piece of legislation which legislates the rights of all of us, but in particular people who may lack capacity whether it be permanently or temporarily. The Mental Capacity Act places the individual at the heart of decision-making. Capacity always needs to be presumed unless proven otherwise. Decision-making needs to be supported to enable the individual as far as possible to take their own decisions. Unwise decisions should never be used as proof of lacking capacity – like others, those with impairments are entitled to take risks and to make poor decisions if they have capacity. A person should not be deemed incapable merely because of an unwise decision. When a person is found to lack capacity for a specific decision, the 'best interests' process ensures that their wishes and feelings remain central to the decision being made and, importantly, provides protection from harm to vulnerable adults. The Act signified a step change in the legal rights afforded to those who may lack capacity, with the potential to transform the lives of many. That is the aspiration of the Act and the House of Lords, debate and I for one fully endorse this.

Caroline Alexander
Chief Nurse NHS England – London Region

Equality Assurance

"Equality and diversity are at the heart of NHS England's values. Throughout the development of the policies and processes cited in this document, we have given due regard to the need to eliminate discrimination, harassment and victimisation, to advance equality of opportunity, and to foster good relations between people who share a relevant protected characteristic (as cited in under the Equality Act 2010) and those who do not share it."

Using the Mental Capacity Act 2005 in practice

The Mental Capacity Act 2005 (MCA) and the Deprivation of Liberty Safeguards contained in it, provide a fundamental safeguard for Human Rights. The MCA also provides a framework to enable adults (and young people over 16) to make their own decisions.

The MCA has significant implications for **all practitioners**, whether they are working with people who have capacity, have impaired or fluctuating capacity, or are incapacitated.

The Act provides the legal protection that capacity is always assumed unless there is clear evidence to establish incapacity. Where a person has capacity any care and treatment will require their informed consent.

For people who have an impairment that impacts on their ability to exercise their capacity and to make their own decisions, the Act requires that practitioners consider **and make all reasonable adjustments** that would allow the person to make their own decisions.

For people who lack the capacity to make a particular decision, the Act requires that practitioners always act in the **person's best interests** in making a decision or acting on their behalf. Practitioners should always identify and consider using the **least restrictive option** available. They should identify all relevant circumstances, **take into account the person's views, beliefs and values and consider the views of those who have an interest in the person's welfare when** making a "best interests" decision.

When working with any capable person, practitioners should also consider and support the person to consider forward planning. This is particularly the case where they might lose capacity in future. Forward planning can involve the use of advance decisions, advance statements or the setting up of Lasting Powers of Attorney.

Applying the five principles that underpin the Mental Capacity Act 2005

A fundamental aim of this Act is to ensure that individuals who lack capacity are able to take part in decisions that affect them and that all reasonably practicable steps should be taken to achieve this. To that end, the following statutory principles must be applied in order to protect the rights and the voice of the patient:

1. You must always assume a person has capacity unless you can establish that they do not (that is, for the decision that needs to be made at the time it needs to be made).
2. You must take all practicable steps to enable people to make their own decisions, before you can consider making a decision for them.
3. You must not assume incapacity merely because someone makes an unwise decision.
4. Where a person does not have capacity you must always act in their best interests.
5. You must ensure that any proposed action or decision taken under "best interests" is the least restrictive option in all the circumstances.

Making an assessment of capacity

The Act requires professionals to help and support people to make their own decisions. This is called supported decision making, where professionals spend time to help people undestand the options and the consequences of their choices.

Where there is evidence that a person may lack capacity for a particular decision, the two-stage test for capacity must be followed. The two-stage test applies whether it is a low level decision such as bathing or hygiene issues or a high level decision such as lifesaving treatment or where they reside.

- **Stage one:** Does the person have an impairment of or disturbance in the functioning of their mind or brain (temporary or permanent)?
  - If no, the person will have capacity. If yes, move to Stage two:
- **Stage two:** Is the person at the time the decision needs to be made able to:
  - Understand the information relevant to the decision
  - Retain that information (for as long as needed to take the decision)
  - Communicate their decision by any means (such as speech or sign language)
  - Communicate their decision by any means (i.e. speech, sign language)?

Relevant information does not mean explaining all peripheral detail. It is only what is needed to help the person understand the decision they need to take, this includes the nature of the decision, the reason it is needed and the consequences of making it or not making it.

If the person fails on one or more points of the stage-two test this determines that they lack capacity for the decision in question.

If there is more than one decision to be made, each decision should be assessed separately.

How to act in someone's best interests

There are a number of key principles to take into account when making a best interests decision on behalf of a person who lacks capacity. Practitioners should consider all relevant circumstances which include those they are aware of and those it would be reasonable to regard as relevant. The other criteria to take into account include:

- Do not make assumptions about capacity based on age, appearance or medical condition
- Ensure that the person is enabled to participate as fully as possible

- If it is feasible to wait to make the decision to allow a person to regain capacity in relation to the matter in question, then do so
- Take into account so far as reasonably ascertainable in the circumstances. The person's past and present beliefs, values, wants, wishes and feelings
- In so far as practical or possible the best interest decision maker should take into account the view of others who may be able to offer a relevant view or opinion as to the patient's interests. This could include for example, views of specific family members, friends, advocates and carers or other professional staff involved in the patient's care.
- Check if the person has any advanced decision or statements in relation to the decision in question.
- Identify the least restrictive options for the person in making a decision in their best interests and taking action.
- Check the view of a Deputy or holder of a health and welfare Lasting Power of Attorney (if there is one).

Further information on best interests decision making is contained in the MCA Code of Practice (Chapter 5) and in your organisations policies and procedures on the MCA.

Please note that where a person has capacity to make a decision where consent is required, policies and protocols on consent must be followed. Where a person lacks capacity for a decision where consent is required, a MCA Best Interests decision must be made.

What else do you need to consider?

Forward planning can involve the use of advanced decisions, advanced statement or the setting up of Lasting Power of Attorney.

Advance Decision

An individual must be 18 years old or more to make an advanced decision. An advance decision is a decision to **refuse** treatment made by a person while they still have capacity to do so and before they need that particular treatment. An advance decision to refuse treatment must be followed if it meets the Act's requirements and applies to the person's current circumstances at a time that they have subsequently lost capacity. Particular care should be taken where the Advance Decision applies to the refusal of life sustaining treatment as there are particular requirements under the Act. Practitioners should check if there is a valid/current advance decision in place when looking to take a best interest's decision.

Advance Statements

Advance statements are written statements made by the person before they lose capacity. These statements could include information about the preferred type of care or treatment they would want in the case of future illness or where they would want to live. Although not carrying the same legal status as advance decisions, consideration should be given to any advance statements in any best interest decision.Practitioners should check if there is a current advance statement in place before making a best interest's decision.

Emergency Treatment

There may not always be time in genuine emergency situations for full investigation and consultation. The Act states that you can lawfully take action where you have a reasonable belief that someone lacks capacity, and what you do is reasonably believed to be in the persons best interests. This can include restraint if it is proportionate and necessary to prevent harm, if this is immediately necessary for life sustaining treatment or a vital act, while a court order is sought if needed (MCA S4b).

Serious Medical Treatment

The meaning of 'serious medical treatment' is indicated in Practice Direction 9E w.

Serious medical treatment may be treatment which is likely to have serious consequences for the patient, which may involve prolonged pain, distress or side-effect or may have a serious impact on their future life choices. This would include decisions taken when any illness is newly diagnosed; health screening; any decisions not to treat or investigate symptoms; decisions about ceilings of treatment; non-emergency 'Do not attempt cardio pulmonary resuscitation decisions'; and any major decision that may be life-changing.

Lasting Power of Attorney

This is a document which allows a person to appoint somebody else to act on their behalf should they lack the capacity to do so in future. The Lasting Powers of Attorney may cover property and affairs (including financial matters), and may also cover personal welfare (including healthcare and consent to medical treatment or both). Practitioners should check if there is a valid/current Lasting Power of Attorney in place before making a best interest's decision.

Planning for the Future: Lasting Powers of Attorney and Deputyship orders

It is important to help patients consider who they would trust to legally act for them financially and in terms of their health and wellbeing should a time come when they are unable to do so themselves. To create a Lasting Power of Attorney.

The patient must be 18 or over and have the mental capacity to do so, this will need certification.

A **Lasting Power of Attorney (LPA)** is a legal document that allows someone (the 'donor') to choose other people ('attorneys') to make decisions on their behalf if and when they lack mental capacity to make decisions for themselves.

There are two types of LPA:

1. Health and welfare for example covering – your daily routine such as eating and what to wear; medical care; moving into a care home; life-sustaining treatment and so on.
2. Property and financial affairs for example covering – paying bills; collecting benefits; selling your home and so on.
   - A person can have both types of LPA
   - An LPA can be created online at the Office of the Public Guardian website: **gov.uk/office-of-public-guardian** or by requesting paper forms by calling: **0300 456 0300**

This information concerns the health and welfare LPA

Points to note:

- the donor and attorney must be 18 years of age or more.
- there may be more than one Attorney appointed.
- an Attorney cannot delegate responsibility under the LPA.
- an LPA must be registered by the Office of the Public Guardian before it can be used
- the health and welfare LPA **cannot** be used where the donor still has capacity
- attorney(s) are bound to follow the five key principles of the MCA 2005 in making decisions in the best interests of the donor
- specific instructions on the donor's wishes, including life sustaining treatment, will be included within the LPA
- attorney(s) can only make decisions about life-sustaining treatment when the donor has specifically stated this in their LPA. These decisions could include declining or withdrawing treatments like artificial nutrition or hydration (ANH) in situations where it has become a burden or is not working

3. Deputies are people appointed by the Court of Protection to act on behalf of somebody lacking mental capacity who does not have a LPA.

Your patient may need a court-appointed deputy instead if they are not able to make their own decisions. To do so contact the Court of Protection:

Email: **courtofprotectionenquiries@hmcts.gsi.gov.uk**
Telephone: **0300 456 4600**

Emergency applications only – out of office hours
Telephone: **020 7947 6000**

If you have a safeguarding concern about a registered LPA or court appointed deputy such as concern that the Attorney does not appear to be acting in the patient's best interest, or to find out if someone has an attorney or deputy acting for them

Contact the Office of the Public Guardian on 0300 456 0300
Or visit: Gov.uk/office-of-public-guardian

Advocacy and Independent Mental Capacity Advocates (IMCA)

The Mental Capacity Act sets up the IMCA's as a statutory service to help people who lack capacity and who have no one else (other than paid staff) to support them, and are facing important decisions, such serious healthcare treatment or change of accommodation. However practitioners should also consider whether an IMCA or other advocate might be helpful to assist an incapable person in other circumstances when a best interest's decision or action is being planned.

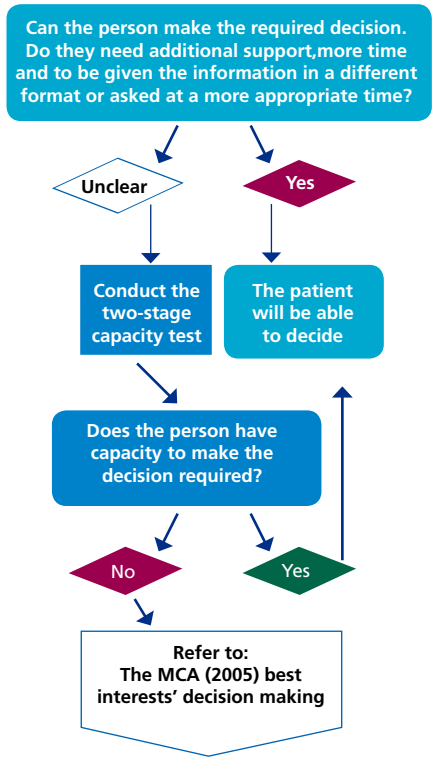
The MCA specifies that an Independent Mental Capacity Advocate (IMCA) must be appointed before a decision is made regarding:

- serious medical treatment.
- NHS accommodation (or change in accommodation) for 28 days or more or in a care home for 8 weeks or more.
- Local Authority arranged accommodation for 8 weeks or more, except in an emergency.

The duty to consult with an IMCA applies where there is no one else for the decision maker to consult with about the person's best interests other than a paid professional.

MCA (2005) decision-making flowchart

All adults should be presumed to have capacity unless an assessment of capacity has shown that a person does not in line with the MCA. If the patient is capable, consent must be obtained by the person undertaking the procedure.



Refer to the five principles of the MCA:

1. Assume a person has capacity
2. Support the individual to make their own decision
3. Someone may make an unwise decision
4. Always act, or decide, for a person without capacity in their best interests
5. Choose the least restrictive option

The two-stage capacity test:

Stage one. Is there an impairment of, or disturbance in the functioning of the person's mind or brain? If so,

Stage two. Does the impairment or disturbance impede the person's capacity to make the particular decision?

Can the person:

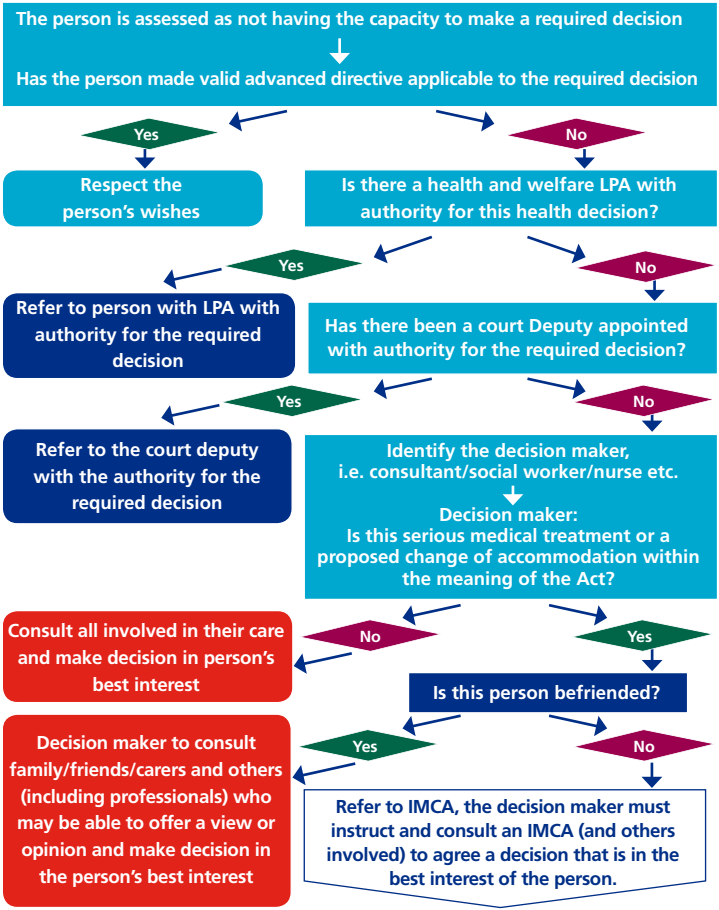
- Understand the information relevant to the decision,
- Retain that information,
- Weigh that information as a part of the process of making a decision and
- Communicate their decision (whether by talking, using sign language or any other means)?

(Person must demonstrate all four functions above to be deemed as having capacity for the required decision-making.)

Record this!

MCA (2005) best-interests

decision-making flowchart



The decision maker:

- Must ensure that the proposed action/treatment is in the best interests of the person.
- The decision maker needs to check if there is an Advance Decision (AD), Lasting Power of Attorney [LPA] or Deputy covering health and welfare or if there is a friend/carer of person nominated by the person to consult.
- Advance Decision must be relevant to this decision.

The best-interests checklist:

When making a decision in someone's best interests one must:

- Involve the person as much as possible
- Find out the person's wishes and feelings
- Consult people who know the person well
- Consider all relevant information in time
- Avoid making the decision if it is likely that the person might regain capacity
- Think about what would be the least restrictive option and not:
- Make assumptions based on the person's age, appearance, condition or behaviour
- Make a decision involving life-sustaining treatment that is motivated by a desire to end the person's life.
- Consult with all relevant others, i.e. the person, medic/GP, carers, Allied Health Professionals, social care staff, Advocate/IMCA, or people who know the person well, i.e. LPA or Deputy or Enduring Power of Attorneys
- Consider all the relevant circumstances relating to the decision in question
- Be able to justify and evidence their decision making
- Ensure that other least restrictive options are always explored (complete best interests decision record).

A formal best interests meeting is not always needed. It is important that consultation has taken place and the decision maker follows the guidance above with all relevant others and this is documented on the agreed paperwork.

Record keeping: it is important that you accurately record and evidence any decisions made with regards to best interests.

Deprivation of Liberty Safeguards (DoLs)

What are they?

The Deprivation of Liberty Safeguards regime provides a legal framework for hospitals and care homes to lawfully deprive patients or residents in their care of their liberty, it it is deemed to be in the best interest and meets all relevant assessment criteria. It also ensures that people are deprived of their liberty **only** when there is no other way to care for them or safely provide treatment in a less restrictive way. DoLS exists to protect people's human rights, where levels of restriction or restraint are applied to such a degree so as to be impacting upon the person's liberty.

For those in supported living or their own home, the DOLs framework does not apply as such and an application should be made directly to the Court of Protection.

DOLs consideration in assessing whether an incapacitated person is deprived of their liberty, the focus should be on:

- Is the patient under constant supervision and control? AND
- Is the patient not free to leave
- What is their objective situation overall?

Note that irrelevant factors are:

- An incapacitated person's compliance or lack of objection.
- The purpose or relative normality of the placement.

Applications for standard authorisations for deprivations of liberty are made to the Local Authority where the person is ordinarily resident as the lawful Supervisory Body. The Local Authority undertakes the prescribed assessments before deciding if the DoL can be authorised. If a person is considered to be deprived of their liberty before the supervisory body can respond to a request for a standard authorisation, a hospital or care home can implement an urgent authorisation themselves for a short period (initially up to 7 days). In all cases where a DoLs authorisation is implemented, it should be in place for no longer than is necessary.

Who do they apply to?

DOLs apply to

- individuals who are over 18 year of age; and
- who lack capacity; and
- are deprived of their liberty in either hospital or a registered care home.

Mental Health Act 1983 (MHA)

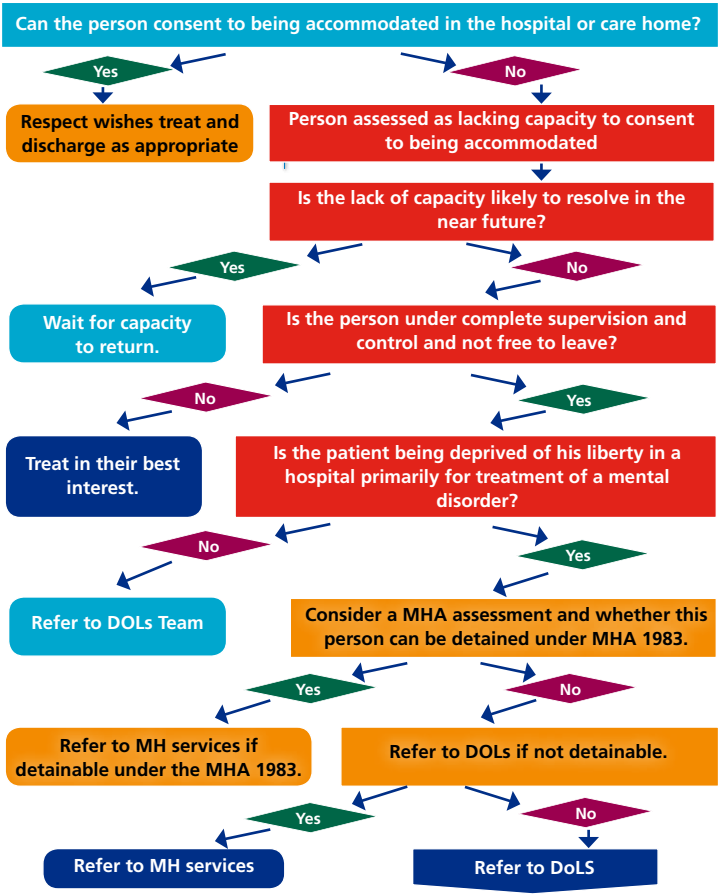
If any patient is subject to the formal provision of the MHA then this is a legal basis for depriving that person of their liberty and it is not necessary of rthere to be any DOLs authorisation. If however the patient is not subject to a provision of the MHA under which they are liable to be detained, then that deprivation will need to be appropriately authorised.

If a person is being deprived of their liberty and they are not in a care home or hospital (but under the care of the state), a DoLs is not applicable, and any deprivation of liberty should only be authorised through the Court of Protection.

Contact your local Safeguarding Lead or Local Authority MCA and DoLS Lead for further information.

Deprivation of Liberty Safeguards (DoLS)

decision-making flowchart



The decision maker:

- Must ensure that the proposed action/treatment is in the best interests of the person
- The decision maker needs to check if there is no Advance Statement Directive (ASD), Lasting Power of Attorney [LPA] or Deputy, or if there is a friend/carer of person nominated by the person to consult.
- The ASD must be relevant to this decision.

Record keeping:

- It is important that you accurately record and evidence any decisions made with regards to best interest.

The person can be treated safely under the wider provisions of the MCA 2005. Person will be supported to make decisions.

Restriction:

- All admissions to hospital will mean some level of restriction on a patient's normal freedoms to choose and act as they would at home.
- However some patients will require an additional level of restriction or restrictions when they lack capacity and need care and treatment in hospital
- Where a person is subject to continuous supervision and is not free to leave then they will require the protection provided by the Dols Safeguards.

What is the difference between a restriction and a deprivation of liberty?

A restriction or restrictions do not always mean that a person is being deprived of their liberty. But note that if a person is subject to continuous supervision and is not free to leave then they will require the protection provided by the DOLs Safeguards

Practitioners should review the range and level of restrictions (including restraint) on the person on a regular basis and where possible reduce, amend or remove the restrictions that are in place (applying the "least restrictive" principle)

Practitioners will need to consider all the factors in the individual situation of the person concerned who is subject to restrictions to decide if they might amount to a deprivation of liberty.
In practice, this will include consideration of:

- The intensity and degree of the restriction or restrictions in place
- The circumstances, totality and nature of the restriction or restrictions in place
- Whether there are significant restrictions on the person's contact with family, friends or the outside world
- The level of supervision and control including ,whether it is continuous and if a person is not free to leave
- Whether people (staff, carers or family members or the individual) disagree with the current detention and/or level of restrictions

In considering if a person is deprived of their liberty, the incapacitated person's compliance or lack of objection, and the apparent appropriateness of the placement or whether it appears to be in their best interests is irrelevant and must not be taken into account.

Where an incapacitated person is subject to continuous supervision and control by staff and is not free to leave, then practitioners need to be mindful of relevant recent Court Judgements and take advice from their organisations' Mental Capacity Act/DoLs Lead.

What should you do if you are concerned a person is being deprived of their liberty?

Practitioners are not expected to be experts on what is and is not a deprivation of liberty. They do need to know that if they are concerned that a person might be deprived of their liberty, and they must take action to ensure that this is considered by the appropriate authorised person in their organisation.

Therefore, if you have considered and acted to minimise the restrictions on the person and you are still concerned about a possible deprivation of liberty, you should:

- Act quickly to ensure you comply with legislation and your duties of care
- Discuss the case with your manager or authorised person for DoLS
- DoLS and/or Adult Safeguarding Lead if required
- Seek advice from your local authority DoLS team or supervisory body office if needed

When does restriction become a Deprivation of Liberty?

	Restriction		Deprivation of liberty is or could be indicated
	The person attempts to leave on occasions but do not require supervision to prevent then leaving	FREEDOM TO LEAVE	The person attempts to leave, sometimes on a frequent basis, and are subject to supervision to prevent them from leaving
Continuous control and supervision	The person is restrained under the Act periodically	RESTRICTION	The person is restrained regularly and for prolonged periods
	Staff exercise some control over the person	CONTROL	Staff have extensive control over the care and movement of a person (where they can be within the setting + what they can do)
	Contact with others is limited (visiting hours)	VISITORS	Contact with others or the world outside is severely limited because of additional rules
	A person has some choice and control over their daily living within certain limits	LIFESTYLE	A person has little control over their own life because of continous supervision and control placed on them
Freedom to leave	Doors are locked but the person is given access to go out	DOORS	Doors are locked and the person rarely goes out
	Stopping someone leave unless they are escorted	LEAVE	A person is never allowed out without an escort and there are rarely escorts
	Carers request discharge but agree a comprise, for example, discharge but attendence at a day centre	DISCHARGE	Carers request discharge and this is refused (no negotiation)

None of the above examples are prescriptive of a 'restriction' or 'deprivation of liberty' in any case. What amounts to a restriction or deprivation of liberty is dependent on the individual circumstancess. However the above could be a sign of a restriction or a deprivation of liberty.

Adapted from Working with the Mental Capacity Act 2005

Where to find guidance

MCA is available at http://www.legislation.gov.uk/ukpga/2005/9/contents

MCA Code of Practice at: www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf

Social Care Institute for Excellence: http://search.scie.org.uk/?q=mental%20capacity%20act

Office of the Public Guardian website: **gov.uk/office-of-public-guardian**

Court of Protection: Email: **courtofprotectionenquiries@hmcts.gsi.gov.uk**
Telephone: **0300 456 4600**

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