Lewisham CCG

Mental Capacity Act 2005 (MCA) Guidance

Overview

The Mental Capacity Act 2005 covers people in England and Wales who may be unable to make some or all decisions for themselves. The ability to understand and make a decision when it needs to be made is called 'mental capacity'

The MCA applies to anyone aged 16 years and over, and covers a wide range of decisions concerning healthcare, personal welfare and financial matters. Everyone working with, or caring for, an adult who may lack capacity must comply with the MCA and the associated MCA Code of Practice (2007). The MCA is relevant both to people accessing healthcare services, as well as healthcare employees.

The MCA is underpinned by five key principles;

Principle 1 - The **presumption of capacity**

Principle 2 - **Supporting** a person to make their own decisions

Principle 3 - People are allowed to make an **unwise decision**

Principle 4 - Decisions are made in a person's **best interests**

Principle 5 - Decisions made in a person's best interest should be the **less restrictive option**

The MCA also incorporates the Deprivation of Liberty Safeguards (DoLS). A person may be deprived of their liberty because they do not have the mental capacity to consent to their care arrangements, and additionally there is a high level of care provided by the state to ensure their safety and wellbeing.

The MCA is particularly relevant for the work of Lewisham CCG in the following areas;

1. **CCG commissioned services**
2. **CCG primary funder responsibilities** for individually funded care contracts (for example, Continuing Healthcare or MHA Section 117 aftercare
3. **Community partner responsibilities** as a key statutory body

Key areas of relevance

1. CCG commissioned services

Commissioners have a responsibility in promoting MCA compliant services through the commissioning cycle. As a basis, all commissioned services need to demonstrate that they have in place a

- Mental Capacity Act Lead
- Mental Capacity Act Policy
- Mental Capacity Act Training.

The NHS England MCA Guide for CCG's (2014) sets out in more detail what assurance CCG's should reasonably expect to see from hospitals and other services providing care to people aged over 16, and who lack capacity to consent to some or all of their care and treatment.

Assurance frameworks

Type of service	**Assurance arrangements**
NHS providers where standard contract forms basis of contract	• MCA assurance as outlined in the Standard Contract (evidence of MCA Lead, Policy and Training) • In addition, locally agreed quality assurance indicators covering MCA activity for the financial year, to be completed and returned by the end of the subsequent Q1 • MCA indicators and evidence outlined in the report to be presented for discussion at CQRG yearly.
Spot purchase contracts	Assurance of MCA activity is gained through individual care reviews conducted at least yearly

Process for obtaining MCA assurance from NHS providers (process re-commenced yearly)

Period	Actions	CCG Personnel/ Structures involved
Q3 Year 1	CCG identifies key indicators of MCA compliance as part of commissioning intentions	MCA Lead outlines relevant indicators
Q4 Year 1	Indicators are agreed to be included in the new contract and associated quality schedule	Commissioning managers ensure indicators are included in new contract

Q1 – Q4 Year 2	Provider collates evidence to populate indicators	
Q1 Year 3	Provider reports on preceding year MCA indicators	AD for Quality collates and analyses report Report is presented to CCG Governing Body Indicators form basis of thematic discussion at CQRG

2. **CCG primary funder responsibilities**

The CCG may be the primary funder of care for people who require individually commissioned placements. This may be evident through Continuing Healthcare, mental health commissioning (for example Section 117 aftercare), or children's continuing healthcare commissioning.

In these cases, even though the care plan may have been arranged by another NHS service, the CCG assumes a high degree of responsibility for the care arrangements by virtue of being primary funders. Funding a care arrangement also implies validity of those care arrangements.

Typically, people who require individually commissioned placements need to make complex decisions about their future. This could involve decisions about the amount and type of care to receive, and the most suitable place in which to receive it. People who do not have mental capacity to make these complex and serious decisions need to have decisions made for them in accordance with the process outlined in the MCA. For a person whose mental capacity may be in doubt, the decision maker must consider the following person centred question;

- What should my care and support arrangements be?

In answering that question, the necessary care arrangements to keep someone who lacks capacity safe and cared for could impinge on fundamental human rights and freedoms such as their liberty, autonomy and privacy. There are two human rights that CCG's need to give particular attention to;

- Right to liberty
- Right to a private and family life

Because of the potential impingement on a person's rights and freedoms, the care plan may be challenged, and open to legal scrutiny; the CCG potentially being asked to justify the care arrangements it has funded in a court of law.

As responsible primary funders for individual care arrangements, it is essential that the CCG is assured in three key areas;

- **assessment** of a person's mental capacity
- the decision about care arrangements are in a person's **best interest**
- if there has potentially a high level of impingement on a person's rights and freedoms because of the proposed care arrangements, and in consequence the person is being **deprived of their liberty**; that the correct legal safeguards are in place to protect the individual.

Assessment of a person's mental capacity

Commissioners need to receive specific assurance that an assessment of capacity has been completed in the following scenario;

- Person is aged over 16
- There is reason to doubt a person's capacity
- CCG are primary funders of care
- Either a new or amended care plan/ arrangement is proposed
- A person is not proposed to be detained under section 2/3 of the MHA

See appendix 1 for what should be included in a robust capacity assessment

Best Interest decision

If a person has been assessed as not having capacity to make a decision about their future care arrangements and a new or amended care arrangement is proposed, commissioners must be assured that a Best Interest decision has been made on the person's behalf. The best interest decision should cover two main elements;

- Compliance with the Best Interest checklist outlined in the MCA Code of Practice
- Analysis of available care options, with balance sheet approach

See appendix 2 for what should be included in a best interest decision

Deprivation of Liberty

A person may be deprived of their liberty if;

- They do not have capacity to consent to their care arrangements
- They are under 'continuous supervision and control' and 'not free to leave'
- The state is involved in their care arrangements
- They are aged 16 or over

In accordance with the European Convention on Human Rights, if a person's liberty is deprived it must be authorised by a court of law. The court will provide the necessary scrutiny of the deprivation, and also allows legal authority for the person to challenge the deprivation. The deprivation of liberty process therefore ensures people's rights and freedoms are protected.

It is essential that any proposed care arrangements that deprive someone of their liberty are **authorised before they occur.** If a person is unlawfully deprived of their liberty they may wish to seek compensation from one or more of the state bodies involved. This could include the CCG.

Deprivations of Liberty can be authorised either by the local authority DoLS service or directly by the Court of Protection. See appendix 3 to ascertain how your clients deprivation of liberty needs to be authorised.

Outline of key roles and responsibilities with individually funded clients;

		NHS service/ case manager/ care co-ordinator (external to Lewisham CCG)	**Lewisham CCG CHC/ MH**
Assessment of Capacity		Prior to consideration of new care arrangement undertake a capacity assessment in line with MCA 2005	Request completed capacity assessment and scrutinise for quality. Store copy if appropriate.
Best Interest decision		Following capacity assessment make best interest decision in line with MCA Code of Practice.	Request completed Best Interest decision and scrutinise for quality. Store copy if appropriate.
Deprivation of Liberty	Proposed care arrangements will be for an **adult** in a registered care home or hospital	Notify Local Authority DoLS team that person likely to be deprived of their liberty as a result of	Ask involved NHS service whether local authority DoLS team have been

		the proposed care arrangements	informed of possible deprivation. If this has not happened, inform them.
	Proposed care arrangements will be a. For a **child** aged 16-17 b. For an adult, in any setting that **is not** a registered care home or hospital setting	Complete 'clinical' Court of Protection forms as directed by commissioner	Complete and collate appropriate Court of Protection paperwork. Instruct legal services to quality check documents and send to Court of Protection. Inform case manager/ service provider when deprivation is authorised.

Objection to a DoLs

A person is legally entitled to challenge any new or existing deprivation of liberty in a court of law. As primary funders, the CCG may well be asked to be a party to court proceedings. If this is the case, the CCG is likely to be asked to provide evidence of previous capacity and best interest decisions, and to complete fresh assessments. The precise nature of what is expected from the CCG is different with each case, this being laid out within the respective court order.

Tenancy

Commissioners should be vigilant if a person without capacity has to take out, or relinquish a tenancy as part of their care arrangements. This is a serious decision that may impinge on a person's right to a private and family life. Decisions about tenancy are usually made directly by the Court of Protection. Commissioners should engage in discussion with their case managers to ensure the correct legal pathways are followed.

Personal financial/ property management

Commissioners should assure themselves that case managers have identified people without capacity who may need support in managing their personal finances, clarified how their money is being managed and signposted to the correct support service if appropriate.

Difficulties with managing personal finances may impact greatly on a person's autonomy and dignity.

CCG internal assurance concerning primary funder responsibilities.

The CCG needs to assure itself that good MCA practice is being followed towards people who lack capacity and who are receiving individually funded care arrangements, and that their rights and freedoms are being supported in accordance with the law.

The CCG will assure itself in two ways;

- For each new care arrangement, or change in existing care arrangement, respective commissioner will complete CCG MCA Assurance Checklist document
- Annual report will be submitted at year end to the IGC and Governing Body outlining
  - Compliance with checklist (aim for 100%)
  - Any highlighted areas for improvement in assurances
  - Summary of CCG involvement at the Court of Protection

3. CCG community responsibilities for MCA

The MCA comes under the remit of the Lewisham Safeguarding Adults Board. The constitution of the LSAB states that the LSAB provides the local leadership on the application of the MCA by its partners.

By being a member of the LSAB, the CCG has a responsibility to work in partnership with other LSAB members to enhance MCA awareness and application across sectors, and to the community in its broadest sense.

Responsibilities:

- **Managing Director**

The Accountable Officer is ultimately responsible for ensuring that as an accountable organisation, the CCG ensures the principles and practice of the MCA is delivered effectively, both in the CCG and across the health economy through CCG commissioning arrangements.

- **Governing Body**

The Governing Body is responsible for setting local strategy and context of MCA work in the organisation and in the health economy. They will do this by

Keeping informed of current issues relating to MCA

Establishing robust contractual arrangements to ensure MCA compliance in commissioned services

Monitoring CCG MCA assurance via annual report from the CCG Integrated Governance Committee

- **Executive Lead for Safeguarding/ MCA**

The executive lead is responsible for providing assurance to the Governing Body of the effectiveness of MCA arrangements both internally and within commissioned organisations. The professional MCA lead is the Adult Designate.

- **Associate Director for Quality**

The AD for quality is responsible for ensuring that MCA is included in the quality schedule and contract monitoring processes.

- **Commissioners**

Commissioners are responsible for ensuring MCA is included in prospective tenders, service specifications, contracts, and assurance arrangements for new services.

Commissioners of individually funded care arrangements are responsible for ensuring the CCG MCA assurance checklist is completed, and acting accordingly to manage any deficits.

Commissioners of individually funded care arrangements are responsible for monitoring and managing contractual obligations from provider services in terms of MCA, through the case review process.

Commissioners of individually funded care arrangements are responsible for alerting relevant CCG managers if legal services may need to be accessed.

- **CCG Designated MCA Lead**

The MCA lead will ensure that Lewisham CCG is complying with its own organisational obligations in terms of effective MCA policies, suitable training and staff competencies.

The MCA lead is the first point of organisational contact for any complex MCA issues highlighted by staff providing expert advice on a range of MCA issues as required.

The MCA lead is the CCG representative on external MCA groups and forums.

The MCA Lead is responsible for exploring best practice and current updates in MCA and using this information to inform relevant CCG employees as well as the Governing Body.

The MCA lead is responsible for producing an annual CCG safeguarding report including MCA data.

- **All Lewisham staff CCG staff are**

Responsible for complying with these guidelines

Attending training/ awareness sessions when provided and completing e learning safeguarding training.

Advising their line manager of any changes in practice, policy or processes that may become apparent through using the Lewisham CCG MCA guidelines or through enhancing knowledge and awareness of MCA.

Training

The MCA is a law that affects all of us. Anyone in any position where interaction with the public is a part of their role, will need to have a basic awareness of the principles of the Act and what it means to them in their roles. This includes organisations responsible for commissioning care.

The National Mental Capacity Act Competency Framework provides a framework for the CCG to ensure staff members are trained appropriately for their role and responsibility

Staff Group	Staff members	Level of training	Method and Frequency
A	All CCG staff	Basic knowledge Level 1	E-learning 3 yearly
C	Commissioners, CHC team CCG Executive Lead for MCA CCG Governing Body Lead for MCA AD for Quality	As per staff group A, plus knowledge relevant for commissioners.	As above and; 3 hours face to face training provided 3 yearly
E	CCG MCA Lead	As per staff group A and C, and additional knowledge	As above and additional professional development; Attendance at seminars and study days. Evidence of reflective practice

Appendix 1

Minimum information to be expected in an assessment of mental capacity

Information required	Accompanying Notes
Name and details of the service user	
What is the specific decision relevant to the capacity assessment?	*The decision should be person centred. An example of a relevant decision where CCG funded care is planned might be;* ***'What should my care arrangements be?'***
Who is carrying out the capacity assessment?	*The person completing the assessment should be the person most relevant to the decision, and /or who has greatest responsibility for the decision. In terms of assessing capacity for care needs, this is not always a physician. It could be the discharge nurse, case manager, occupational therapist or other relevant professional.*
Has the person been supported to enable them to make their own decision?	*The first three principles of the MCA are aimed at enabling people to make their own decisions. It is crucial that the assessor evidences what support has been provided throughout the assessment to enable a person to make their own decision, if possible.*
Diagnostic Assessment Is there an impairment or disturbance in the functioning of the person's mind or brain?	*The Diagnostic Assessment and Functional Assessment make up what is known as the 'two stage' test of capacity.*

Functional Assessment Can the person understand the information relevant to the decision? Can they retain that information long enough to make the decision? Can they use or weigh up that information as part of the process of making the decision Can they communicate their decision, by any means available to them?	*The capacity assessment must have detailed information relevant to each part of the capacity assessment.* *This could include, for example, details on the questions asked by the assessor to probe understanding, and the answers received.* *The person must be able to understand, retain, weigh up and communicate all relevant factors to the decision, to be assessed as having capacity.* *Conversely, If they are unable to do any part of the functional assessment, and the inability is linked with an impairment of brain or mind, only then can a person be said to be lacking capacity for that decision.* *This may not be verbal but by other means i.e. non verbal*
Conclusion	*Has the person mental capacity to make the decision, or not?*

Appendix 2

Minimum information to be expected in a Best Interest decision

Information required	Accompanying Notes
Details of the decision maker	*This is likely to be the same person as who made carried out the capacity assessment*
Is the person likely to regain capacity? Can the decision be delayed?	
What are the views of the person who lacks capacity, including past and present wishes and feelings, beliefs and values?	*Case Law indicates that the views, wishes, feelings and beliefs of the person, both present and past have become increasingly relevant when considering their best interest.*
Has there been consultation with other relevant people for their views about the person's best interests.	*This should be where practicable and appropriate. The people who have been consulted should be listed, and their views documented.*
Does this decision meet the criteria for an Independent Mental Capacity Advocate?	*In the case of a serious decision, such as a change of accommodation, if the person does not have any friends or family members willing to support the person, it is very likely that an IMCA should be instructed*
Is there a valid Power of Attorney for health and welfare, or a Court Appointed Deputy?	*A valid Power of Attorney or Court Appointed Deputy may have legal jurisdiction to make the best interest decision*

<table>
<tr>
<td>Is there another, least restrictive option?</td>
<td>It is crucial that, for serious decisions such as changing accommodation, all options have been laid out and the benefits and burdens of each option considered. This must be presented to the CCG for assurance. To illustrate;
<table>
<tr><th>Option</th><th>Benefit</th><th>Burden</th></tr>
<tr><td>1. Return home with package of care</td><td>Person's preferred option

Person familiar with surrounding</td><td>Person may be isolated for long periods

Environment unsuitable</td></tr>
<tr><td>2. Care Home placement</td><td>Carer always on hand to meet needs

Access to social activities</td><td>Person likes own company

Care Home is not close to family</td></tr>
</table>
</td>
</tr>
<tr>
<td>Have all parties agreed that the option chosen is in the person's best interests?</td>
<td>If there is any disagreement amongst parties what is in a person's best interest with a serious matter such as their care arrangements, the Court of Protection may be needed to adjudicate.</td>
</tr>
</table>

Appendix 3

Commissioner checklist for CCG assurance to be completed prior to procurement of an individually funded care arrangement.

Client Identifier:				
		Comments	Name	Date
Is there a robust Capacity Assessment?	YES/NO			
Is there a robust Best Interest decision?	YES/NO			
Are the different options laid out, in a balance sheet approach?	YES/NO			
Are the care arrangements potentially depriving the person of their liberty?	YES/NO			
If the person is deprived if their liberty, and the person is an adult to be accommodated in a registered care home or hospital, have the DoLS team been informed?	YES/NO			
If the person is an adult, deprived of their liberty and **are not** in a registered care home or hospital, have the CCG arranged a deprivation of liberty via the Court of Protection	YES/NO			
If the person is deprived of their liberty and is a child aged 16	YES/NO			

and 17 years, have the CCG arranged a Deprivation of Liberty via the Court of Protection?				
Does the person need to end/ start a tenancy?	YES/NO			
Are we assured that the person does not have a need for personal financial management?	YES/NO			