Mental Capacity Act
(Northern Ireland) 2016

Mental Capacity Act

Phase 1 Commencement
Background to the Act

• The Act received Royal Assent 9 May 2016 – Bill became the Act!

• Fuses mental health and mental capacity legislation – single legislative framework

• Parity of esteem mental health / physical health
Overview of the Act

• The Act when fully commenced
  – For care, treatment or personal welfare of a person aged 16 or over who lacks capacity
  – Revokes Mental Health (NI) Order 1986 for persons aged 16+
  – Extremely wide – covers all programmes of care
  – Criminal and civil justice provisions
1st Phase Commencement

• 1st phase commencement
  – Deprivation of Liberty Safeguards
  – Offences
  – Money and valuables in residential care and nursing homes
  – Research (commenced 1 October)

Go live date 2 December 2019
Research

• Research provisions came into force 1 October 2019
• Parity with England and Wales
• Regulates intrusive research that is not a clinical trial relating to persons over 16 who lack capacity
Money and valuables

- Mental Health Order makes provisions in relation to persons incapable of managing their property and affairs (due to mental disorder)
- Article 116 provides that hospitals and accommodation managed by a HSC Trust can receive and hold money and valuables on behalf of such patients
- No equivalent provisions for independent sector
- Section 276 of the MCA provides for Regulations to accommodate this
Deprivation of Liberty

Not free to leave
and
Continuous supervision and control

• Examples:
  – Locked care or nursing home (residents prevented from leaving)
  – Care home with keypad entry/exit and resident does not have code
  – Locked hospital ward
  – Acute ward where patient is bed bound but would be prevented from leaving if they had the ability to
  – Day care centre where person is not allowed to leave
Deprivation of Liberty Safeguards

• If person deprived of liberty must have lawful authorisation

• In Northern Ireland before 2 December
  – High Court declaratory order
  – Mental Health (NI) Order 1986
  – Criminal justice / children legislation

From 2 December 2019:
Deprivation of Liberty Safeguards under the Mental Capacity Act (NI) 2016
Deprivation of Liberty Safeguards

• If person deprived of liberty must use Deprivation of Liberty Safeguards (DoLS) under the Mental Capacity Act where no other lawful authority exists.

• Not having lawful authority means the deprivation is unlawful – false imprisonment.
  – No reliance on common law defence of necessity – must have authorisation.

Reason for deprivation is irrelevant. DoLS must be used.
5 Principles

1. Person cannot be treated as lacking capacity unless it has been established that they lack capacity in relation to the matter in question
2. Respect for decisions even if unwise
3. No unjustified assumptions based on age or condition
4. Must always act in person’s best interests
5. Support must be provided
Unwise decision – case example

• Case study
  – Mary – 19 year old with mild learning disability
Protection from Liability

- Provides a protection where an act/intervention otherwise would be unlawful or a civil wrong
- Does not provide power to act
- Protection for person doing the act, not the person making the decision

Protection from liability only applies if all safeguards and additional safeguards are met!
Safeguards and Additional Safeguards

• Safeguards:
  – Reasonable belief of lack of capacity
  – Reasonable belief of best interests

• Must always be in place
Capacity test for DoLS

• The capacity test relates to the deprivation of liberty.
• The capacity test does NOT relate to where the DoL takes place.

Does P lack capacity in relation to whether he or she should be detained in the place in question? (Schedule 1 Paragraph 10(d))
Lack of Capacity

• A person lacks capacity in relation to a matter if, at the material time, he or she is:

“unable to make a decision for himself or herself about the matter, because of an impairment of, or a disturbance in the functioning of, the mind or brain.”
Capacity: 3 Element Test

- Causal link: "because of"
  - Lack of Capacity
- Impairment or disturbance test
- Functional test: "unable"
Capacity – case example

• Case study
  – Roberta – 84 year old with early onset dementia
Best Interests

- No unjustified assumptions
- All relevant circumstances
- Likely to regain capacity?
- Participation by P
- **Special regard** to P’s past and present wishes, feelings, beliefs and values
- Consult “relevant people” where practicable and appropriate
- Consider less restrictive options
- Likelihood of harm if fail to act
Best Interests

• Case example
  – 85 year old man in care home
Best Interests – case example

• Case example
  – Ben, 73 year old man with long standing mental illness
  – Example not relating to DoL but highlights best interests and special regard
Additional Safeguards

- Formal assessment of capacity
- Nominated person
- Prevention of serious harm condition
- Authorisation

Prevention of serious harm condition must always be met!
Formal Assessment of Capacity

• Must include written “statement of incapacity”
• Must be made by suitably qualified person with specialist training and relevant experience:
  – Medical practitioner;
  – Nurse or midwife;
  – Social worker;
  – Occupational therapist;
  – Speech and language therapist;
  – Dentist; or
  – Practitioner psychologist.
Nominated Person

• Appointed by P, if P has capacity to do so
• If not, default list – P’s primary carer at top
• Tribunal can appoint or replace NP
• Not decision maker
Prevention of Serious Harm Condition (POSH)

- Prevention of serious harm condition must be met for a DoL to take place.

Failure to detain P would create a risk of serious harm to P or risk of serious physical harm to others and that the likelihood of harm and seriousness of harm is proportionate to the detention.
Prevention of Serious Harm Condition (POSH)

- Case example
  - 85 year old man

- Just because there is a risk of a fall or a risk of wandering there is not automatically a risk of serious harm
Authorisation

• All DoL **must** be authorised
• 2 types of authorisation
  – Short-term detention in hospital
    • Authorised by signing report
  – Trust panel authorisation
    • Authorised by trust panel decision on application to trust
• IF short term detention can be used, it must be used
• IF MHO can be used, it must be used
Extensions

• Panel authorisations can be extended for initially 6 months, then 12 months thereafter

• Extension can be via:
  – Making of a report; or
  – By application to a Trust Panel where the Responsible Person does not agree that criteria are met
Disagreements

- No appeal mechanisms in respect of formal assessment of capacity and best interests statement
- Short-term detention authorisation and trust panel authorisation can be appealed to Review Tribunal
- Trust panel decision to refuse authorisation cannot be appealed
- Review tribunal decision can be appealed on point of law to Court of Appeal
Emergencies

• A DoL can be carried out if the emergency conditions under the Act are met
• Only if there is an unacceptable risk of harm to P to comply with safeguards straight away
• Safeguards that can be delayed:
  – Formal assessment of capacity
  – Need to consult NP
  – Authorisation (by panel or report)
• Safeguards that must **always** be met:
  – Reasonable belief of lack of capacity
  – Reasonable belief in P’s best interests
  – Preventions of Serious Harm condition
Exceptions

• Person in intensive care with life threatening illness
Practicalities of DoLS

- New system is called Deprivation of Liberty Safeguards
- IF MHO can be used, it must be used
  - No changes to MHO detentions in 1st phase
- Trust responsibility that authorisation is in place
- Trust responsibility for trust panel, as the state actor involved in P’s care or treatment
- Criteria and Who does what
Criteria for detention under DoLS

• Always
  – Failure to detain P would create a risk of serious harm to P or of serious physical harm to others
  – The detention is proportionate to the likelihood and seriousness of the harm
  – P lacks capacity in relation to the detention
  – It is in P’s best interests to be detained

• Short-term detention in hospital
  – In hospital
  – P has an illness or there is reason to suspect that P has an illness

• Trust panel authorisations
  – Appropriate care and treatment is available to P in the place
Short-term detention in hospital

- Short-term detention in hospital needed
- Assessment of capacity / formal assessment
- Best interests determination / statement of best interests
- Admission report immediately on admission
- Report authorising the detention (valid for 14 days)
- Medical report (within 2 days of examining P)
- Further admission report (if required) within 2 days
- Further report within 14 days
- End of short-term detention
  - Maximum 28 days from admission
Short-term detention in hospital needed

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9. End of short-term detention
   - Maximum 28 days from admission
Trust Panel Authorisation

1. Deprivation of liberty is needed
2. Assessment of capacity / formal assessment
3. Best interests determination / statement of best interests
4. Medical report (within 2 days of examination of patient)
5. Trust panel decision
   - Maximum DoL 6 months (initially)
6. Application to trust panel
Trust Panel Authorisation

- Deprivation of liberty is needed
- Assessment of capacity / formal assessment
- Best interests determination / statement of best interests
- Medical report (within 2 days of examination of patient)

Trust panel decision
Maximum DoL 6 months (initially)

Application to trust panel
Trust Panel Authorisation

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- Medical report (within 2 days of examination of patient)
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Trust panel decision
Maximum DoL 6 months (initially)
Trust Panel

- Trust panel consists of 3 people
  - Medical practitioner
  - ASW
  - Suitably qualified person

- Decision taken on papers
  - Expected to take approximately 1 hour per case
  - Expected case load first year of 7,500 cases
  - Case load expected to significantly drop in subsequent years

- Majority decisions
- Maximum 7 days to make decisions
The Trust Panel can make 3 decisions:

1. Authorise the detention amounting to DoL
2. Refuse to grant an authorisation
3. Interim authorisation (maximum 28 days)
Where an authorisation has been granted an application can be made to Review Tribunal

- P and NP can make an application
- Referred to AG if P lacks capacity on whether an application should be made

Tribunal can:
- Revoke the authorisation
- Take no action in respect of the authorisation
Offences

- Ill-treatment and neglect
- Unlawful detention
- Obstruction
- Forgery and false statement
- Help a person to abscond
- Corporate liabilities
  - Senior officers and corporate bodies
Code of Practice and Forms

• Code of Practice:
  – High level overview of Act
  – Processes and flows
  – Explains concepts

• DoH provides Forms
  – 20 statutory and 1 non-statutory

• Forms **must** be used

• Contents of the Forms cannot change, however, the format and style can

• Other aids
Guidance / Leaflets

• Guidance and/or leaflets will be provided

• For:
  – The person lacking capacity on rights and roles under the DoLS
  – Nominated persons on their roles
  – Others that are involved / care about those who lack capacity
Training

- Training packages will be made freely available by DoH
- DoH will fund an initial programme of training in 2019 for health and social care workers from all settings, trusts, community and voluntary and private
- Training available:
  - Level 2 – E-learning – DoL – for all
  - Level 3 – ½ day classroom – DoL – for those involved in DoL
  - Level 4a – ½ day classroom – formal assessment of capacity – only for those carrying out formal assessments
  - Level 4b – ½ day classroom – practical elements of 4a – requires prior attendance at level 4a
  - Level 5 – ½ day classroom – trust panel – for trust panel members
- To be suitable qualified to carry out assessments and make reports level 2, 3 and 4a are required.
  - If not suitably qualified cannot make formal assessment of capacity or applications or reports
  - If made by wrong person -> DoL unlawful
- To be a trust panel member level 2, 3, 4a and 5 are required.
- Level 4b is recommended to all who does level 4a, but is not required
- Training will be delivered through CEC
Further information

www.health-ni.gov.uk/mca

For any queries please contact:
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