

# North Somerset Multi-Agency Adult Safeguarding Procedures



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## Putting the Mental Capacity Act into Practice

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## Introduction

This guidance will provide information for individuals and organisations across North Somerset who wish to understand their responsibilities under the Mental Capacity Act (MCA) in relation to people who may lack mental capacity to make some decisions for themselves.

## The Mental Capacity Act & Deprivation of Liberty Safeguards (DoLS) Team

The role and remit of North Somersets Mental Capacity Act (MCA) & Deprivation of Liberty Safeguards (DoLS) Team is outlined in the teams factsheet [Mental Capacity Act \(MCA\) and Deprivation of Liberty Safeguards \(DoLS\) team factsheet](#).

## The Mental Capacity Act 2005 (MCA)

The Mental Capacity Act 2005 (MCA) is designed to protect and empower people to make their own decisions about their care and treatment. It applies to people aged 16 and over.

The Mental Capacity Act applies to all professions – doctors, nurses, social workers, occupational therapists, healthcare assistants, and support staff. All staff and their employers have a duty to ensure they know how to use it.

It covers decisions about day-to-day things like what to wear or what to buy for the weekly shop, or serious life-changing decisions like whether to move into a care home or have major surgery.

The following are examples of impairments or disturbances of the mind or brain that may impact on a person's capacity to make a decision (this list is not exhaustive):

- With dementia
- With a learning disability
- With a brain injury
- Who are neurodivergent
- Who are experiencing poor mental health, and/or who have a diagnosed mental health condition
- Who have had a stroke

- Who are in addiction
- Who are experiencing unconsciousness caused by an anaesthetic, and/or sudden accident

It is important to note that just because a person has one or more health conditions it doesn't necessarily mean they lack the capacity to make a specific decision.

Someone can lack the capacity to make some decisions (for example, to decide on complex financial issues) but still have the capacity to make other decisions (for example, to decide what items to buy at the local shop).

The MCA says you must:

- assume a person has the capacity to make a decision themselves unless it's proved otherwise
- wherever possible, support people to make their own decisions
- don't treat a person as lacking the capacity to make a decision just because they make an unwise decision
- if you make a decision for someone who doesn't have the capacity, it must be in their best interests
- treatment and care provided to someone who lacks capacity should be the least restrictive of their basic rights and freedoms

The MCA also allows people to express their preferences for care and treatment, and to appoint a trusted person to make a decision on their behalf should they lack capacity in the future.

See North Somerset Council's [Power of attorney, deputyship, and appointee practice guidance for more information.](#)

Where someone doesn't have a trusted person to represent them or make a decision on their behalf, or where there are concerns about the trusted person, they should be provided with an independent advocate, who will support them to make decisions in certain situations, such as serious treatment or where the individual might have significant restrictions placed on their freedom and rights in their best interests.

See North Somerset Council's Advocacy policies for more information.

<https://n-somerset.gov.uk/sites/default/files/2024-05/ICAA%20policy%20FINAL.pdf>

<https://n-somerset.gov.uk/sites/default/files/2024-05/Independent%20mental%20capacity%20advocacy%20policy%20FINAL.pdf>

### Who can complete a mental capacity assessment?

Anyone caring for or supporting a person who may lack capacity could be involved in assessing capacity.

The MCA is designed to empower those in health and social care to do capacity assessments themselves, rather than rely on expert testing by psychiatrists or psychologists – good professional training is key.

However, in cases involving complex or major decisions you may need to get a professional opinion. This could be a general practitioner (GP) or a specialist (consultant psychiatrist or psychologist).

See: [Assessing capacity - SCIE](#) and [Mental Capacity Guidance Note Capacity Assessment March 2023.pdf](#) for guidance on carrying out and recording capacity assessments

[Please see appendix one: North Somerset Capacity Assessment Pro-Forma.](#)

### How is mental capacity assessed?

The MCA sets out a 2-stage test of capacity:

The MCA sets out a 2-stage test of capacity:

- Stage 1 – Is the person unable to make a particular decision (the functional test)?
- Stage 2 – Is the inability to make a decision caused by an impairment of, or disturbance in the functioning of, a person's mind or brain? This could be due to long-term conditions such as mental illness or learning disability, or more temporary states such as confusion, unconsciousness, or the effects of drugs or alcohol (the diagnostic test).

People can lack the capacity to make some decisions but have the capacity to make others. Mental capacity can also fluctuate with time – someone may lack capacity at one point in time but may be able to make the same decision at a later point in time.

Where appropriate, people should be allowed the time to make a decision themselves.

The MCA says a person is unable to make a decision if they can't:

- understand the information relevant to the decision
- retain that information
- use or weigh up that information as part of the process of making the decision

### Supporting people to make their own decisions

Before deciding a person lacks capacity, it's important to take steps to enable them to try to make the decision themselves.

For example:

- does the person have all the relevant information they need?
- have they been given information on any alternatives?
- could information be explained or presented in a way that's easier for them to understand (for example, by using simple language or visual aids)?
- have different methods of communication been explored, such as non-verbal communication?
- could anyone else help with communication, such as a family member, carer or advocate?
- are there particular times of day when the person's understanding is better?
- are there particular locations where the person may feel more at ease?
- could the decision be delayed until they are better able to make the decision?

For example, the person might lack capacity on a temporary basis as a result of an infection.

### Is the decision in their best interests?

If someone lacks the capacity to make a decision and the decision needs to be made for them, the MCA states the decision must be made in their best interests.

The MCA sets out a checklist to consider when deciding what's in a person's best interests.

It says you should:

- encourage participation – do whatever's possible to permit or encourage the person to take part

- identify all relevant circumstances – try to identify the things the individual lacking capacity would take into account if they were making the decision themselves
- find out the person's views – including their past and present wishes and feelings, and any beliefs or values
- avoid discrimination – don't make assumptions on the basis of age, appearance, condition or behaviour
- assess whether the person might regain capacity – if they might, could the decision be postponed?

It's vital to consult with others for their views about the person's best interests. In particular, try to consult:

- anyone previously named by the individual
- anyone engaged in caring for them
- close relatives and friends
- any attorney appointed under a Lasting Power of Attorney or Enduring Power of Attorney
- any deputy appointed by the Court of Protection to make decisions for the person.

[Please see appendix two for the Best Interests Pro-forma.](#)

### **Finding the least restrictive option**

Before you make a decision or act on behalf of someone who lacks capacity, always question if you can do something else that would interfere less with their basic rights and freedoms.

This is called finding the "least restrictive alternative". It includes considering whether there's a need to act or make a decision at all.

Where there's more than one option, it's important to explore ways that would be less restrictive or allow the most freedom for a person who lacks capacity.

The final decision must always allow the original purpose of the decision or act to be achieved.

Any decision or action must still be in the best interests of the person who lacks capacity.

Sometimes it may be necessary to choose an option that isn't the least restrictive alternative if that option is in the person's best interests.

## Advance statements and decisions

### Advance statements

An advance statement is a written statement that sets down a person's preferences, wishes, beliefs and values regarding their future care. It's not legally binding.

The aim is to provide a guide for anyone who might have to make decisions in a person's best interests if that person has lost the capacity to make decisions or communicate their decision.

An advance statement can cover any aspect of a person's future health or social care support needs.

This could include:

- how they want any religious or spiritual beliefs they hold to be reflected in their care
- where they would like to be cared for – for example, at home or in a hospital, nursing home or hospice
- how they like to do things – for example, if they prefer a shower instead of a bath, or like to sleep with the light on
- concerns about practical issues – for example, who will look after their pet if they become ill

### Advanced decisions

An advance decision (sometimes known as an advance decision to refuse treatment, an ADRT, or a living will) is a legally binding decision that allows someone aged 18 or over, while still capable, to refuse specified medical treatment for a time in the future when they may lack the capacity to consent to or refuse that treatment.

An advance decision must be valid and applicable to current circumstances. If it is, it has the same effect as a decision made by a person with capacity – healthcare professionals must follow the decision.

If the advance decision refuses life-sustaining treatment, it must:

- be in writing, signed and witnessed



- state clearly that the decision applies even if life is at risk

People who make an advance decision may wish to consider letting their family, friends and carers know about it.

Find out more about advance decisions and advance statements here: [Advance decisions, advance statements and living wills](#).

## The Court of Protection

The [Court of Protection](#) oversees the operation of the Mental Capacity Act and deals with all issues, including financial and serious healthcare matters, concerning people who lack the mental capacity to make their own decisions.

The court also tries to resolve all disputes when the person's carer, healthcare worker or social worker disagrees about what's in the person's best interests, or when the views of the attorneys conflict in relation to property and welfare.

The court hears important cases, such as whether the NHS should withdraw treatment, whether a serious medical treatment decision is in a person's best interests, or whether it's in a person's best interests to be deprived of their liberty.

Cases can be brought to the court by family members, as well as advocates and professionals involved in decisions.

## The National Mental Capacity Forum

The National Mental Capacity Forum is a joint initiative of the Ministry of Justice and the Department of Health and Social Care. Its purpose is to work with stakeholders from health and social care to identify actions which member organisations can pursue, especially at a local level, to improve implementation of the MCA. As part of its work, it has arranged a series of rapid-response NCMF Webinars to be hosted by the Essex Autonomy Project. Please refer to their website to find information about registration, as well as materials from the webinars themselves.

[Please use this link to find out more, including resignation details for webinars.](#)

# Deprivation of Liberty Safeguards (DoLS)

## What are the Deprivation of Liberty Safeguards?

The Deprivation of Liberty Safeguards, or DoLS, come under the Mental Capacity Act. They currently apply to people living in hospitals, care homes and nursing homes. The law says that no one should be deprived of their liberty unless this has been done through a process prescribed by law and that they have access to a right of appeal. The DoLS are necessary to make sure that any deprivation of liberty is lawful.

## The Acid Test

The “Acid Test” is used by practitioners to objectively identify a possible deprivation of liberty. The Acid Test looks at the following:

- does the person lack the capacity to make a decision about where they are living and what their care and treatment needs are?
- are they subject to continuous supervision and control?
- are they not free to leave or to live elsewhere without the permission of others?
- are their care and treatment “imputable to the state”? (this means is there any state involvement in their care and treatment, this would include funding of the placement or hospital, and it would also include the place being regulated by the state, such as being monitored by the Care Quality Commission or indeed if the local authority has been made aware of the person in some way)

If the answer to all of these questions is “yes” then the person is being deprived of their liberty and this should then be authorised by the local authority (also referred to as the Supervisory Body). The hospital or care home (also referred to as the Managing Authority) should make an application for a deprivation of liberty safeguards authorisation and, where possible, this should be done in advance of the person moving to the placement.

For further information, please see [SCIE – Deprivation of Liberty Safeguards at a glance.](#)

## Guidance

The Law Society has issued comprehensive guidance on the law relating to the deprivation of liberty safeguards [Understanding when someone is deprived of their liberty | The Law Society](#).

The safeguards aim to ensure that those who lack capacity and are residing in care homes, hospitals and supported living environments are not subject to overly restrictive measures in their day-to-day lives.

The guidance was commissioned by the Department of Health and aims to help solicitors and frontline health and social care professionals identify when a deprivation of liberty may be occurring in a number of health and care settings. It uses case scenarios to explain the law, following the landmark judgement of the Supreme Court in the case of Cheshire West (2014).

Quick reference sheets included in the guidance also highlight relevant liberty-restricting factors and key questions for practitioners relating to each individual setting.

## How to request a DoLS

Partners must apply to the local authority for the necessary authorisation. The appropriate forms can be found on the GOV.UK website [Deprivation of liberty safeguards: resources - GOV.UK](#).

There are two referral forms:

- ADASS Form 1 - this is to be used when no previous application from the care setting has been made.
- ADASS Form 2 - this is to be used where there has been a previous Standard Authorisation (DoLS) granted and the care home/hospital would like to extend it.

Applications should be sent to the local authority where the person is ordinarily resident (see [Ordinary residence guidance factsheet](#))

All new DoLS referrals and queries are sent to [DoLS.service@n-somerset.gov.uk](mailto:DoLS.service@n-somerset.gov.uk) via email. The DoLS service telephone number is 01275 885222.

More information about applying to North Somerset Council for authorisation can be found on the NSSAB website [Deprivation of Liberty safeguards | Adult Safeguarding Board](#).

## Advocacy

In some cases, a person may have the legal right to an advocate. This is called Statutory Advocacy.

[The Advocacy People](#) are the commissioned provider of Statutory Advocacy services in North Somerset. Their contact details are as follows:

PO Box 375, Hastings,

East Sussex, TN34 9HU

[info@theadvocacypeople.org.uk](mailto:info@theadvocacypeople.org.uk)

0330 440 9000

For more information about advocacy please refer to North Somerset Council's Advocacy policies:

- [Adult Social Services - Independent Care Act Advocacy Policy](#)
- [Adult Social Services - Independent Mental Capacity Advocacy Policy](#)

# Appendix one: North Somerset - Capacity Assessment

See: [Assessing capacity - SCIE](#) and [Mental Capacity Guidance Note Capacity Assessment March 2023.pdf](#) for guidance.

Person's name:

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Person's DoB:

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Name / Profession of Capacity Assessor(s):

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**Please ensure that it is identified to the person that a capacity assessment in relation to the specific decision is being completed and why this is being done.**

A) What is the *specific* decision in question and why does it need to be made?

B) Why is a capacity assessment being completed? (**1<sup>st</sup> stage of 2 stage capacity test: Functional** - *Is the person functionally able to make the decision being asked of them? Have they been offered all required support to assist them in making the decision for themselves?*)

C) Does the person have a suspected (evidenced) or diagnosed *Mental Impairment*? (**2<sup>nd</sup> stage of 2 stage capacity test – Diagnostic**)

D) Is the person's inability (functional aspect) to make the specific decision because of the identified impairment or disturbance (diagnostic aspect)? Or to put it another way, is the mental impairment causing the person to be unable to make the decision in question? OR is there another reason they are unable to make the decision?

E) What *relevant information* does the person need to understand in order to make this decision? (Note, the person must be told what the decision is and why they are being asked to make it)

F) Record how you gave this *relevant information* to the person and steps you took to help them understand the issue (have you taken all practicable steps to do this? Is there something you could do to support the person to have the capacity to make this decision?)

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G) Interview - Assessment

<p>G1. Does the person <b><u>understand</u></b> the relevant information detailed above?</p> <p><i>Does the person understand the purpose of the assessment and what the decision is to be made? Do they understand the individual elements of the 'relevant information' as they are discussed with them? Have you presented the different available options if there is a choice to be made? (Ensure the bar is not set too high. Remember there are case law frameworks for some key decisions)</i></p>	<p>Assessor's Judgement</p>
<p>Assessor's observations &amp; person's response –</p>	<p>Yes / No</p>

<p>G2. Can the person <b><u>retain</u></b> the relevant information detailed above?</p> <p><i>The person only needs to be able to retain the information in order to make the decision at the material time – meaning when they are being asked to make the decision. If they can only make the decision in a short timeframe but cannot recall it over a longer period, that may be sufficient for them to HAVE capacity, although it this may be dependent on the specific decision in question</i></p>	<p>Assessor's Judgement</p>
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<i>(Please see guidance notes for fluctuating capacity if person is unlikely to retain information over a longer period.)</i>	
Assessor's observations & person's response –	Yes / No

<p>G3. Can the person <b><u>use or weigh</u></b> the relevant information detailed above as part of the process of making the decision?</p> <p><i>Can the person weigh up the pros and cons of the decision (making the decision, or NOT making it), OR can they give an account of professional's concerns and forward reasons why they disagree with them? Is there evidence of 'reasoning' being used to guide the person's decision? Note – not agreeing with professional's concerns does not necessarily equate to a lack of capacity, also ensure that your own views / values are not influencing your assessment of their reasoning.</i></p>	Assessor's Judgement
	Yes / No

<p>G4. Can the person <b><u>Communicate</u></b> their decision?</p> <p><i>Usually only if the person has <b><u>no</u></b> verbal or nonverbal communication will they fail this element of the test (e.g., the person is unconscious or in a permanent vegetative state, minimally conscious state). If you have assessed that they are unable to understand, use or weigh or retain the information BUT they are able to communicate their wishes / feelings in some way, this should be recorded.</i></p>	Assessor's Judgement
Assessor's observations & person's response –	Yes / No

#### H) Capacity Assessment Decision

Only one element must be ticked from the 3 choices below

{ } – 2 stage test of capacity: There is no evidence that they are functionally unable to make this specific decision due to a diagnosis or evidenced suspicion of a Mental Impairment. Therefore, the person **HAS** capacity to make the decision.

{ } - The 4 elements above are *all marked YES* therefore the person **HAS** capacity to make the decision.

{ } - *One or more* of the 4 elements above are marked NO therefore the person **LACKS** capacity to make the decision.

#### 1) Follow on work

Any elements that apply should be ticked from below. If the person has been assessed to lack capacity for the specific decision in question, then the best interest process **MUST** now be followed.

{ } – As the person lacks capacity, a Best Interests meeting/discussion will take place ASAP

{ } – As the person lacks capacity, I am going to refer to an appropriate professional to organise a Best Interests meeting / discussion ASAP

{ } – The person has capacity and is subject to restrictions upon their choices that require urgent review.

{ } – I will seek a 2<sup>nd</sup> opinion on this individual's capacity.

{ } - The person's cognitive state is stable or deteriorating and, in my view, they are unlikely to regain capacity in relation to this matter in the near future.

{ } - The person's cognitive state is improving, and I believe capacity should be re-assessed shortly.

{ } - I believe the person could regain capacity to make the decision with support and advice from others.

{ } - The person's cognitive state is fluctuating on an hourly / daily / weekly \* basis. In my view there is a reasonable possibility they will have capacity in relation to the decision shortly. \* *Delete as applicable*

Please provide further detail on the boxes ticked above including pending actions. Please also use this space to record any other thoughts or recommendations you have regarding the issue.

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H) Signature(s) & date

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## Appendix two: North Somerset - Best Interests pro forma

Name of person

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DoB of person

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Date of meeting / discussion

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A) What is the Best Interests decision to be made?

B) Has a capacity assessment been completed in relation to this decision?  
If answer is 'No' then stop best interests process & initiate capacity assessment.

C) Does the authority for making this decision lie under other provisions of the Mental Capacity Act (Lasting / Enduring Power of Attorney, Deputyship or Declarations made by the Court of Protection, Advance Decision to Refuse Treatment). If the answer is 'Yes', detail Authority below move to Part P, detail any follow up work in part R.

(What evidence have you seen? OPG100 check completed?)

D) If there is no other Authority identified in C) above who is the 'Decision Maker' in regard to this issue?

E) Is the decision one that can only be considered by directly the Court of Protection OR is the decision one that is excluded from the remit of the Mental Capacity Act?  
If yes, then move to part P, record follow up work in part R.

F) Is the Best Interests discussion taking place as a formal meeting / individual discussions / telephone conversation / written communication? More than one may apply.

G) What are the person's views on this matter, now and in the past? What decision would they have made if they had capacity? How have you ascertained this?

H) Detail who has been consulted as part of this Best Interests discussion / meeting.

I) If unable to ascertain an interested parties' views on this matter detail the reason for this here.

J) Are the conditions for appointing an IMCA met? If so, please detail the IMCA consulted.

If there are no interested parties to consult and the decision involves a serious medical treatment or a change of residence, then the decision maker **MUST** appoint an IMCA. (IMCAs may also be appointed if there are safeguarding concerns or doubts around family / friends acting in the individual's best interests)

K) Consider the different options for the person considering the available resources.

Does the decision need to be made now in full?

L) Consider the pros and cons of each option. Risks and benefits must include psychological & emotional elements alongside physical factors.

M) Considering boxes J, K, & L above what do the group feel is the **least restrictive option** considering, **best interests**, **what the person would have wanted** & **available resources**.

N) Follow on work - All parties **do** agree (tick all that apply)

- { } – Additional individuals need to be consulted and a repeat Best Interests decision made.
- { } – The individual's cognition is fluctuating or improving and their capacity requires re-assessing shortly.

O) Follow on work – One or more parties **do not** agree (tick all that apply)

- { } – I will organise a formal 'round table' Best Interests Meeting.
- { } – I will make a referral for Advocacy Services.
- { } – I will refer the matter to my line manager.
- { } – I will investigate a referral to the Court of Protection.
- { } – There is a dispute as to the individual's capacity and I will organise a re-assessment.
- { } – The individual's cognition is fluctuating or improving and their capacity requires re-assessing shortly.

P) Other Decision Making Authority

- { } – The authority to make the decision lies under the following provisions of the Mental Capacity Act (Lasting /Enduring Power of Attorney, Deputyship / Declarations under the Court of Protection, Advance Decision to Refuse Treatment )
- { } - The decision is so serious it may only be considered by the Court of Protection.
- { } – The decision is one that is excluded from the remit of the MCA.
- { } – The decision made is likely to constitute a deprivation of liberty and a referral to the appropriate supervisory body must now be made.

Q) Review (best interest decisions should be periodically reviewed, frequency dependent on the individual circumstances)

The Best Interests decision should be reviewed by the following date:

The individual's capacity should be reassessed by the following date:

R) Please provide detail here regarding any follow up work.

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S) Signature(s) & date

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