



Mental Capacity Act 2005

16 – 17 year olds

(Young People)

Training provided by: Mental Capacity Cat

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Any reference to the Code of Practice means the Mental Capacity Act 2005 Code of Practice and not the draft MCA Code developed and consulted on in relation to the implementation of the Liberty Protection Safeguards unless stated otherwise.





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Mental Capacity Act 2005

Who it applies to and its importance



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MCA 2005 – Who it applies to and who it helps

- *Children Act 1989* - the term child is used to refer to people aged under 18.
- *Chapter 12 Mental Capacity Act 2005 Code of Practice:*
 - An **Adult** is a person aged **18 years or over**
 - A **Young Person** is a person aged **16 or 17 years old**
 - A **Child** is a person **under the age of 16** years old.
- Section 2(5) of the Mental Capacity Act 2005 provides no powers under the Mental Capacity Act may be exercised in relation to a child under 16.
- *Section 2(6) making an exception for some decisions about a child's property and financial affairs where a person is likely to lack capacity to make financial decisions after reaching the age of 18.*





MCA 2005 – Who it applies to and who it helps

16/17 year olds cannot:

- Make advance decisions to refuse treatment (but could make an advance statement)
- Cannot grant a power of attorney (or be an attorney)
- Cannot make a statutory will





MCA 2005 – Who it applies to and who it helps

- *“Section 5 of the 2005 Act gives a general authority, to act in relation to the care or treatment of P, to those caring for him who reasonably believe both that P lacks capacity in relation to the matter and that it will be in P’s best interests for the act to be done. This will usually suffice, unless the decision is so serious that the court itself has said it must be taken to court.”*

- Lady Hale para 38 N v ACCG [2017] UKSC 22

- The MCA is designed to protect and empower individuals who lack capacity to make various decisions





MCA 2005 – a question to ask?

- There is a legal duty for professionals to have regard and comply with the Mental Capacity Act 2005 where it applies to the circumstances of a young person aged 16 or 17.

STOP – THINK – ASK

- What are we trying to do/achieve?
- Is the young person's capacity relevant to the decision?
- Does the MCA apply?



Did you know?

The Mental Capacity

Act has 5 key principles



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Principle



Assume a person
has the capacity
to make a decision
themselves,
unless it's proved
otherwise

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Principle 1 – Capacity is presumed

- Where the MCA 2005 applies to decision making - the moment a young person wakes up on their 16th birthday, they are presumed to have decision making capacity
- Do our assessments and care plans for those 16 and 17 reflect this presumption?
- Does our practice reflect this presumption?
- The **burden of proof** falls to the person who asserts that the young person lacks decision making capacity
- The presumption of capacity does not give a licence not to investigate



Principle 2



Take all practical steps to
support decision making before
concluding a person is unable
to make a decision
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Principle 2 – Practicable steps

- Communication Strategies (non-verbal communication)
- Providing information in an accessible form (videos, photographs, drawings)
- Treating an underlying disorder to enable a person to regain capacity
- Ensure a person is in an environment which they are comfortable in
- Involving experts to support a person express their views
- Provide information over a period of time (structured learning to acquire new skills)
- Postpone decision making if it is felt a person may regain/gain capacity over time (when appropriate to do so)
- We also need to be thinking, **WHEN** we need to start taking those steps (possibly in advance of 16 to maximise the young persons capacity in the future)





**A PERSON SHOULD NOT
BE TREATED AS
INCAPABLE OF MAKING
A DECISION
MERELY
BECAUSE THEIR DECISION
SEEMS UNWISE**

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**Been
there,
done cat!**





Principle 3 – Unwise decisions

If P has capacity to make a decision then he or she has the right to make an unwise decision and to suffer the consequences if and when things go wrong. In this way P can learn from mistakes and thus attain a greater degree of independence.

A Local Authority v JB [2021] UKSC 52





Principle 3 – Unwise decisions

- *“Teenagers are prone to making unwise decisions, it is often the most effective way to learn” – Liverpool City Council v CMW [2021] EWCOP 50*
- Balancing the implications of the MCA with duty of care and responsibilities under safeguarding can be a challenging balancing act




Competence v Capacity

What test do we apply for 16/17 year olds?

What about Parental Responsibility?



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Competence v Capacity? - What test do we apply?

Gillick Competence:

- Gillick competence is not Mental Capacity – it does not relate to an impairment or disturbance to the functioning of the mind or brain
- Gillick competence relates to a functional ability to make a decision if there is sufficient maturity and intelligence to understand the nature and implications on the decision being made.
- Gillick makes clear that the authority of parents to make decisions for minor children (under 16) is not absolute and diminishes with a child's evolving maturity
- The test for assessing whether a child under 16 can give valid consent (or make a decision for which consent is needed) is determined by Gillick Competence





Competence v Capacity? - What test do we apply?

- For purposes of medical treatment:

“Once the child reaches the age of 16: (i) the issue of Gillick competence falls away, and (ii) the child is assumed to have legal capacity in accordance with s.8 Family Law Reform Act 1969, unless (iii) the child is shown to lack mental capacity as defined in ss. 2(1) and 3(1) Mental Capacity Act 2005.”

An NHS Trust v X [2021] EWHC 65(Fam)



What is Mental Capacity?

The test and applying it



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Mental Capacity – The Legal Test

Section 2: People who lack capacity

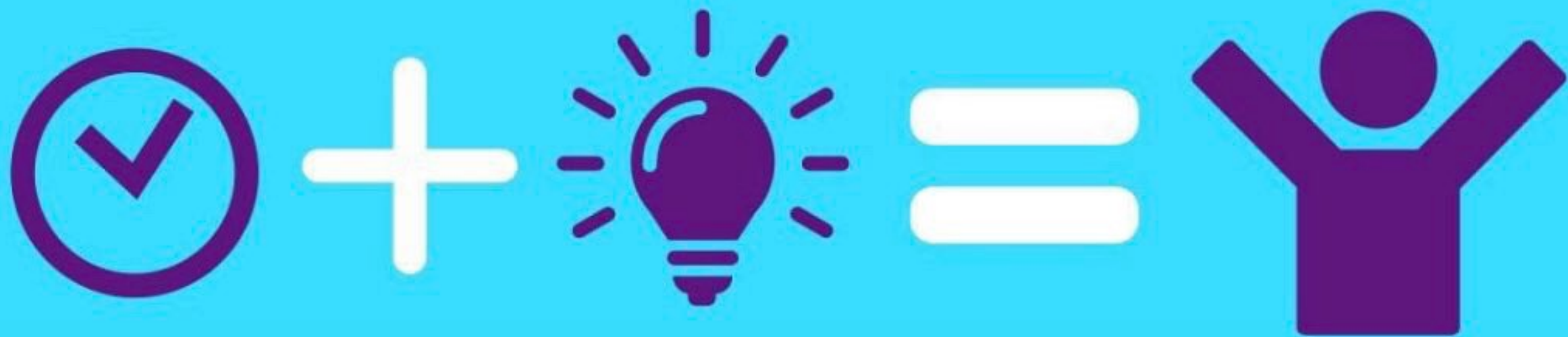
(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

Section 3: Inability to make decisions

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable

- (a) to understand the information relevant to the decision,
- (b) to retain that information,
- (c) to use or weigh that information as part of the process of making the decision, or
- (d) to communicate his decision (whether by talking, using sign language or any other means).





Capacity is: time
+ decision specific

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Order of the questions

- Can the person make the decision? If not:
- Is there an impairment or disturbance in the functioning of the person's mind/brain?
- Is the person's inability to make a decision because of the impairment/disturbance in the functioning of the mind or brain?
(Causal nexus)

Case law has made it clear that you start with the functional test.

A Local Authority v JB [2021] UKSC 52



Fluctuating Capacity



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Fluctuating Capacity – Decision Making Context

- A person's ability to make a decision may fluctuate because of the nature of a condition that they have.
- This may take place over days or weeks (for instance where a person has bipolar disorder)
- This may even take place over the course of a day (for instance a person with dementia whose cognitive abilities are significantly less impaired at the start of the day than towards the end.)





Fluctuating Capacity

One off decisions/isolated incidents

- It may be possible to put off a decision until the impact of the person's condition upon decision making has diminished.
- If it is not possible to put the decision off, then take the minimum action necessary pending the person regaining decision making capacity.






Fluctuating Capacity

Repeated decisions

- Some decisions such as management of a physical health condition require many “micro decisions” over the course of the day.
- Whilst capacity is time and decision specific taking a **broad view as to “material time” is crucial**
- This is especially so if the consequences of the decisions are serious and the person only has capacity to make them for a very small part of the time.





Fluctuating Capacity – longitudinal view?

- If the reality is there are limited periods during the day that a person can make their own decisions, it would usually be appropriate to proceed on the basis that they lack capacity to do so if in reality it is only a very small part of the time the person can make such decisions.

(Royal Borough of Greenwich v CDM [2019] fluctuating capacity – macro v micro decisions in managing diabetes.)

- Keeping decision making capacity under review is really important here.





A Local Authority v PG & Ors [\[2023\] EWCOP 9](#)

- The case concerned a 34 year old woman, PG, who had diagnoses of an intellectual disability in the moderate range, and autism spectrum disorder.
- She had also recently been diagnosed as having "trauma based mental illness with Emotionally Unstable Personality Disorder traits" (impulsivity, suicidal thoughts and emotional instability)
- The parties agreed that PG lacks capacity in the following respects – to conduct these proceedings and to enter into an occupancy agreement and to make decisions about where she lives.
- The parties disagreed about whether PG has capacity in respect of decisions about her care, including when she is within the home, when in the community, and at times of heightened anxiety.
- They also disagreed as to whether she has capacity as to contact with others, including at times of heightened anxiety.





Fluctuating Capacity

- **A Local Authority v PG & Ors** [\[2023\] EWCOP 9](#)
- *"the Court of Protection has frequently had to consider the position of a person who has "fluctuating capacity" and such cases have been treated somewhat differently."* – para 30 Lieven J
- *Anticipatory declarations v Longitudinal approach.*





Fluctuating Capacity – Longitudinal View

- Lieven J therefore considered that the

43. [...] the appropriate approach is to take the "longitudinal view". An anticipatory order would in practice be close to impossible for care workers to operate and would relate poorly to how her capacity fluctuates. The care workers would have to exercise a complicated decision making process in order to decide whether at any individual moment PG did or did not have capacity. This might well vary depending on the individual care worker, and how much of the particular episode they had witnessed or not. The result would fail to protect her, probably have minimal benefit in protecting her autonomy and in practice make the law unworkable.





Fluctuating Capacity

- *44. In my view, the more practical and realistic approach is to make a declaration that PG lacks capacity in the two key respects, but also make clear that when being helped by the care workers they should so far as possible protect her autonomy and interfere to the minimum degree necessary to keep her safe.*





Fluctuating Capacity - tips

- Consider a longitudinal approach to capacity where appropriate
- Work with the individual to help them set out what they would like (or would not like) at points when they may in fact lack capacity to make a decision (windows of opportunity)





Principle



Anything done for or on behalf of a person who lacks mental capacity must be done in their best interests.



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Principle 4 – Best interests

Section 4 of the MCA provides a checklist of steps to follow such as considering:

- i. Whether it is likely that the person will at some time have capacity in relation to the matter in question and when that is likely to be
- ii. Permit and encourage the person to participate in any act done or decision made for them
- iii. Consider the person's past and present wishes and feelings
- iv. The beliefs and values that would influence a decision if the person could make it
- v. Other factors that the person would likely consider if they were able to do so
- vi. Consultation with those who play an important role in that person's life

Chapter 5 of the Code of Practice provides detailed examples and guidance on Best Interests





Best interests – the role of the decision maker

The roadmap for the decision maker as per Section 4:

- “The purpose of the best interests test is to **consider matters from the patient’s point of view**” *Aintree v James* [2014] 1 AC 591
- Identify relevant circumstances
- Avoid discrimination (based on appearance, age or behaviour)
- Assess whether a person might regain/gain capacity
- Consult others
- Avoid restricting the person’s rights
- Weigh up all of the above
- Be aware of the exceptions



Parental Responsibility



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Parental Responsibility

- Parental Responsibility refers to the “rights, duties, powers, responsibilities and authority which by law a parent has in relation to a child” – Children Act 1989)
- Parental responsibility lasts until the child/young person is 18.
- The decisions that a person with PR can make are those decisions that are seen to sit within the *zone of parental control or scope of parental responsibility*.
- The MHA Code of Practice, (Chapter 19), notes two points that should be borne in mind when considering whether a decision comes within the zone of parental control:
- 19.41 - Is the decision one that a parent would be expected to make?
- Are there any factors that might undermine the validity of parental consent?





Parental Responsibility

- There may be situations when to question whether either the MCA or Children Act 1989 may apply (Decision to be made by someone with Parental Responsibility)
- For those 16+ best practice would indicate using the Mental Capacity Act 2005 process if it applies to a young person





Which Court for what decisions?

- Family Court for Children Act matters
- High Court (Family Division) inherent jurisdiction
 - Medical treatment
 - Confinement *Re A-F (No 1)* [2018] EWHC 138 (Fam) and (2) [2018] EWHC 2129 (Fam)
 - Nb real judicial edginess about use of inherent jurisdiction to circumvent s.25 Children Act 1989 *Re T (A Child)* [2021] UKSC 35
- Court of Protection
 - Welfare
 - Medical treatment
 - Confinement



Deprivation of Liberty

What is a deprivation of liberty?

How do we authorise?

How does this apply to 16-17 year olds?



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Available frameworks to authorise a DoL

- **Mental Capacity Act 2005 (16 and over - Court of Protection)**
- Inherent Jurisdiction of the High Court (under 16)
- LPS in future (maybe!?)
- Children Act 1989
- Mental Health Act 1983
- Other powers including common law and PPO

Emboldened topic addressed in today's training.





Deprivation of Liberty – Article 5 ECHR

- Article 5 ECHR – Right to Freedom and Security
- Article 5(1) – Everyone has the right to liberty and security of person.
- An objective element - "a person's confinement in a particular restricted space for a not negligible period of time"
- A subjective element - "the person has not validly consented to the confinement in question"
- Imputable to the state





Deprivation of Liberty - Definition

- The Supreme Court judgment in *Cheshire West and Chester Council v P* [2014] UKSC 19 [2014] MHLO 16 set out the "Acid Test":
 - **A deprivation of liberty occurs when:**
 - The person is under continuous supervision and control;
 - Not free to leave; and
 - The person lacks capacity to consent to the arrangements which arise from the care and support that deprive them of their liberty.



Principle



Before making a decision or acting on behalf of a person, choose the least restrictive available way of achieving the outcome sought.

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Principle 5 – The least restrictive approach

Questions to ask

- i. “is there anything else that we can do that would interfere less with the person’s basic rights and freedoms”
 - ii. ”Do we need to act or make this decision at all?”
- Be creative and innovative – sometimes the most imaginative solutions can be found to keep a young person safe whilst respecting their right/freedom of actions
 - Sometimes it may be necessary to choose a more restrictive but realistic option (think is this necessary and proportionate to the risk of harm)





Deprivation of Liberty – what are the options?

- If the circumstances in which a young person (16-17) is supported amount to a Deprivation of Liberty under the Acid Test, this deprivation must be authorised by the Court.
- Consenting on behalf of a young person who lacks capacity to consent to a deprivation of liberty has been confirmed by the Supreme Court as not sitting within the “scope of parental responsibility”



Re: D [2019] UKSC 42

Deprivation of Liberty for 16 – 17 year olds



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Re:D - what was the Court asked to consider?

- The Court was asked to consider who can authorise a deprivation of liberty for a young person who had recently turned 16.
- The Court confirmed that someone with parental responsibility cannot consent to a DoL on a 16-17 year old's behalf.





Re:D – the background

- D was born on 23 April 1999. During his early childhood he was diagnosed with ADHD, Asperger's syndrome, Tourette's syndrome and a mild learning disability.
- In October 2013 at the age of 14 he was admitted to a hospital which provided mental health services for treatment and assessment.
- He lived and attended school within the hospital grounds and was unable to leave at will and was accompanied whenever he left the site.
- In 2014, the hospital trust applied to the High Court for a declaration that it was lawful for the trust to deprive D of his liberty and that it was in his best interests.
- In March 2015, Judge Keehan held that D was living in conditions that amounted to depriving him of his liberty but that it was a proper exercise of parental responsibility to keep him under constant supervision and control while he was under the age of 16.
- D was discharged to a residential placement where he was under constant supervision and unable to leave except for planned activity with his parents' agreement.





Re:D – the background

- On his 16th birthday, proceedings were issued in the Court of Protection for a declaration that he would not be deprived of his liberty at the placement because his parents' consent to the deprivation.
- The application was heard in the Court of Protection in November 2015.
- In January 2016 the Judge held that the parents could no longer consent to a deprivation of liberty now that D had reached 16.
- The Council appealed to the Court of Appeal who overturned the first decision stating that a parent could consent on behalf of D to the deprivation of liberty.
- The Official Solicitor's appeal on behalf of D was heard in the Supreme Court.





Re:D – the Supreme Court decision

- The Supreme Court declared by way of majority that D was to be seen as deprived of his liberty for the purposes of Article 5 which protects D who lacks capacity to make a decisions for himself and prevent him from being arbitrarily deprived of their liberty.
- Authorisation by the Court of Protection will be required where a 16- or 17-year-old is subject to care arrangements which amount to a deprivation of liberty and the young person lacks capacity to consent to those arrangements





Re:D – the decision

- Parental consent does not extend to providing consent to arrangements which effectively result in the confinement of that young person:

“49. [It is] not within the scope of parental responsibility for D’s parents to consent to a placement which deprived him of his liberty. Although there is no doubt that they, and indeed everyone else involved, had D’s best interest at heart, we cannot ignore the possibility, nay even the probability that this will not always be the case. That is why there are safeguards required by Article 5. Without such safeguards there is no way of ensuring that those with parental responsibility exercise it in the best interests of a child”



Bolton Council v KL [2022] EWCOP 24



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What did the Court consider?

- The case considered an application by the local authority to reconsider the removing an application for an authorisation of a DoL for a 17 year old who was living in a very long standing foster care placement.
- It was proposed he would remain living there after turning 18
- The Court considered the fact that KL was only 17 years old, subject to a care order, had no family contact and would be transitioning to adult services within 12 months.
- The Court considered for the above reasons the streamlined procedure was not suitable.





What did the Court consider?

SJ Hilder noted:

- *“The streamlined application was devised to meet the minimum requirements for compliance with Convention and domestic law, by abbreviating the procedural requirements of the standard COP1 application process. The difference between the standard and the streamlined court procedures is the intensity of scrutiny. The COPDOL11 process is very definitely not a “rubber stamping” procedure but it relies on judicial antenna alone to identify from paperwork if/where further enquiry is required.”*
- The real question is less about whether a COP1 (welfare application) or COPDOL11 form was used. It was more about whether it is suitable to be run through a paper based process





Seeking advice

- Seek legal advice on cases where a 16-17 year old is deprived of their liberty from your legal teams who will assist in preparing the appropriate application to the Court of Protection.



Authorising a Deprivation of Liberty

Deprivation of Liberty for 16 – 17 year olds



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What to consider – DoL for children/young people

- Seek legal advice
- Before a child with disabilities reaches the age of 16, review their living arrangements to see whether the amount to a DoL/confinement
- In the case of children subject to interim or care orders, the LA should consider whether any children in need or looked after children are (especially in foster or residential placements) confined and whether an application to the High Court is required to authorise the DoL (Re: A-F case)
- A Care Order does not provide authority to deprive someone of their liberty
- Be proactive – be considering as a child is approaching 16 years of age, whether it is likely that child as a young person may lack capacity to consent to the arrangements and take all practical steps to support that child in having capacity upon turning 16 in all decision-making areas due to become relevant to them.
- If valid consent provided by young person, then no DoL as Article 5 not engaged. Very limited circumstances that they can be relied upon.
- If a young person is assessed as lacking capacity and cannot provide valid consent to the DoL, no one with PR can consent to their confinement on their behalf.
- Court of Protection application will be required to authorise the DoL.
- Make preparations in advance of 16th birthday.



Practical steps to take

Authorising a Deprivation of Liberty for 16 – 17 year
olds



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Steps to take in support of a Court application

- A capacity assessment must be undertaken and documented – assessment to determine whether a young person can consent or not to the arrangements of their care which amount to a deprivation of liberty.
- Best interest decision documentation regarding residence and care and support arrangements which amount to a deprivation of liberty demonstrating the Best Interest process has been followed, including consultation.
- The arrangements that amount to a Deprivation of the young person's liberty must be clearly documented in their care plan. (not free to leave and continuous supervision and control.)
- Once the above compiled, seek advice from legal team on making an application to the Court of Protection



In summary....



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Mental Capacity - Conclusion

- The Mental Capacity Act 2005 applies to those aged 16 and above
- Keep in mind the MCA principles – they underpin everything!
- Where there is reason to believe a child moving towards the age of 16 is unlikely to have capacity to make various decisions, forward planning is key, especially where a deprivation of liberty is involved to ensure lawful decision making and authority is in place
- Joint working with adult services is crucial for transitioning young people – Understanding the MCA is a vital part of your role.
- Be proactive where possible - In advance of a child turning 16, think what practical steps can we be taking now to support them to have capacity in decision making domains





Deprivation of Liberty - Conclusion

- A deprivation of liberty occurs when a person is under continuous supervision and control, is not free to leave and lacks capacity to consent to the arrangements of their care.
- In care homes and hospital settings for those aged 18+ an authorisation can be obtained using the Deprivation of Liberty Safeguards procedure. If a young person is due to transition into a residential placement, ensure that this is considered.
- A person who holds parental responsibility for someone aged 16-17 cannot provide consent to the deprivation of liberty on behalf of the young person.
- Where a young person resides in the community (supported living, own home) an application to Court is required to authorise the deprivation of liberty.



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Other resources

Resources:

- <https://www.39essex.com/resources-and-training/mental-capacity-law/>
- https://www.39essex.com/cop_cases/
- <https://www.39essex.com/information-hub/mental-capacity-resource-centre/mental-capacity-resources/mental-capacity-guidance>
- <https://www.mentalcapacitylawandpolicy.org.uk/>
- www.courtprotectionhandbook.com
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