MCA/DOLS Refresher Training: *"Interface between the Mental Health Act 1983 and the Mental Capacity Act 2005"*

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Introduction to the Interface

- The law governing the interface between the Mental Health Act (MHA) and the Mental Capacity Act 2005 (MCA), especially in relation to authorising a deprivation of liberty in hospital settings, is complex and often difficult to implement in practice.

- More guidance is emerging from case law and other sources, such as 39 Essex Chambers. Aim of today is to bring guidance from the law, codes of practice and other sources together, which can be used for quick reference to guide decision making in this field.

- **Note -** The MHA and MCA both cover England and Wales. The MCA and Deprivation of Liberty Safeguards codes of practice also cover both countries, but there are separate codes of practice under the MHA. These provide similar guidance on the application of the act. Information provided today are generally taken from the code of practice for England.

- As a starting point, it is important to understand the key differences between these two regimes…

The scope of the MHA

- Person has to have a mental disorder within the meaning of the act, which is defined as *"any disorder or disability of the mind"*.

Note: Excludes dependence on drugs and alcohol and will only include people with learning disabilities if their disability is *"associated with abnormally aggressive or seriously irresponsible conduct"* (MHA section 1(2))

- Mainly focused on the assessment/treatment of mental disorder in hospital settings, which could be provided under compulsory powers if the person is unable/unwilling to consent, and it is necessary to detain them in hospital to protect them and/or others from harm.

Note: Capacity and best interests are not the central considerations under the MHA, but rather whether it is necessary to detain the person = 'necessity test'.

The scope of the MHA

- If person is objecting to their admission to hospital or to any part of their care and treatment for a mental disorder, and their admission is amounting to a deprivation of their liberty, then the MHA has to be used to lawfully detain that person, regardless of whether they have or lack capacity to make the relevant decision, as long as they meet the criteria for detention under the MHA.

- The MHA can also be used in community settings. This includes guardianship (MHA section 7), community treatment orders (MHA section 17A-17G), conditional discharge (MHA section 41) and leave of absence from detention under the MHA (MHA section 17 leave).

The scope of the MCA

- The MCA was amended by the MHA 2007 to include the Deprivation of Liberty Safeguards (DoLS).

Note: DoLS is part of the MCA and not a standalone piece of legislation. MCA = MCA & DoLS.

- To fall within the scope of the MCA, the person has to be **assessed as lacking capacity** within the meaning of the act:

"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." (MCA section 2(1)).

Key differences between the MHA and MCA

- Trigger for MHA = the person falls within the definition of mental disorder and meets the 'necessity test'. Also where risk of harm to others is a predominant feature.

- Trigger for MCA = Person lacks capacity to make a particular decision within the meaning of the MCA and a decision needs to be made in their best interests. Only need to manage risk of harm to self.

Interface between the MHA/MCA

- There are of course areas that overlap and this is where the interface between the MHA and MCA needs to be considered.
- **In the hospital setting we will be exploring:**
  - Where both MHA and MCA can be applied at the same time
  - Where the MHA will not be available (have to use MCA/DoLS)
  - Where the MHA must be applied (and MCA/DoLS would not be available)
  - Where decision makers have a choice between the MHA and MCA (but have to choose one, e.g. to authorise DOL)
- **In the community setting we will be exploring:**
  - Guardianship and DoLS
  - Community treatment orders (CTOs) and DoLS
  - Conditional discharge and DoLS
  - S17 Leave of absence from detention under MHA and DOLS

Hospital setting - Circumstances where both MHA and MCA can be applied

- If person is detained in hospital under the MHA, but needs treatment for a physical health problem, the MCA (and even DoLS) could potentially be applied alongside the MHA.

- The MHA code of practice for England provides the most up-to-date guidance relevant to this area, which can be found in chapter 13:

"The [MHA] regulates medical treatment of mental disorder for individuals who are liable to be detained under the [MHA]. This may include treatment of physical conditions that is intended to alleviate or prevent a worsening of symptoms or a manifestation of the mental disorder (eg a clozapine blood test) or where the treatment is otherwise part of, or ancillary to, treatment for mental disorder."

- So if a person is detained under the MHA, and needs physical health treatment that is related to their mental health problem, then this treatment can be given under the MHA. Another example would be if a person has self-harmed and needs medical attention.

Hospital setting - Circumstances where both MHA and MCA can be applied…

- But… if the need for treatment for a physical health problem is unrelated to their mental health problem, and the person lacks capacity to make their own decision in relation to this matter, then treatment could potentially be given under the MCA:

"Where individuals liable to be detained under the Act [MHA] have a physical condition unrelated to their mental disorder, consent to treat this physical condition must be sought from the individual. If the individual does not have the capacity to consent, treatment can be provided under the MCA as long as it is in their best interests."

- E.g. if P detained under MHA s.3 needs cancer treatment and lacks capacity to make own decision, then this treatment could be provided in their best interests. Other decisions unrelated to medical treatment, such as around finances/discharge destination, could also be made in the P's best interests under the MCA while P is still subject to the MHA.

Hospital setting - Circumstances where both MHA and MCA can be applied…

- A further example of a clear overlap between the MHA and MCA in a hospital setting is where a person detained under the MHA is placed on section 17 (leave of absence from hospital) and transferred to a general hospital for physical health treatment. If their admission and care or treatment amounts to a deprivation of their liberty, then a DoLS authorisation should be sought (or a Court of Protection order in cases where they fall outside the scope of DoLS).

- This was confirmed in the case of *A Hospital NHS Trust v CD and a Mental Health Foundation Trust* [2015] EWCOP 74, where a woman with paranoid schizophrenia detained under MHA section 3 needed to be transferred to a general hospital for a hysterectomy because of a large ovarian growth. The judge found that it would be lawful to place her on section 17 leave of absence from hospital and then use DoLS to detain her in the general hospital for this physical health treatment.

Case Study – Sarah

- **Sarah, 25, has been detained under the MHA in an eating disorder unit. She needs a blood test because there are concerns that her potassium levels are too low due to a recent increase in purging behaviours. However, she is refusing to have this blood test. What Act should we use?**
- This would be an example of where the physical health treatment (blood test and possible treatment for low potassium levels) can be carried out under the compulsory powers of the MHA, as the purging behaviours (which are causing the need for the physical health treatment) are directly related to her mental health problem (eating disorder).

Case Study – Sarah

- **The blood test has however revealed that Sarah is suffering with leukaemia – what would we need to consider now?**
- If the blood test reveals another physical health problem which is unrelated to her eating disorder, such as the leukaemia, then Sarah's consent will need to be sought for treatment.
- If she has capacity to consent, but is refusing treatment, then this treatment cannot be given to her.
- If she lacks capacity to make her own decision, then the decision maker will need to consider if this treatment would be in her best interests and if so, this treatment could be given under the MCA (Advance Decisions and LPA/Deputies would need to be respected).
- If she needs to be transferred to a general hospital for this treatment, then she should be placed on section 17 leave and the relevant hospital will need to consider whether a DoLS authorisation should be requested.

Circumstances where the MHA will not be available in a hospital setting

- Leading on from the previous point, the MHA code of practice for England specifies that the act will not be applicable in the following cases:

"If the individual is deprived of their liberty and the need for physical treatment is the only reason why the person needs to be detained in hospital, then the patient is not within the scope of the Mental Health Act (as the purpose of the deprivation of liberty is not to treat mental disorder) and a DoLS authorisation or a Court of Protection order should be sought."

- The general principle here is that if the incapacitated person only needs treatment for a physical health problem, and they will be deprived of their liberty in hospital to receive this treatment, then a DoLS authorisation should be sought (even if the person is objecting), as the MHA won't be available.

Case study - Peter

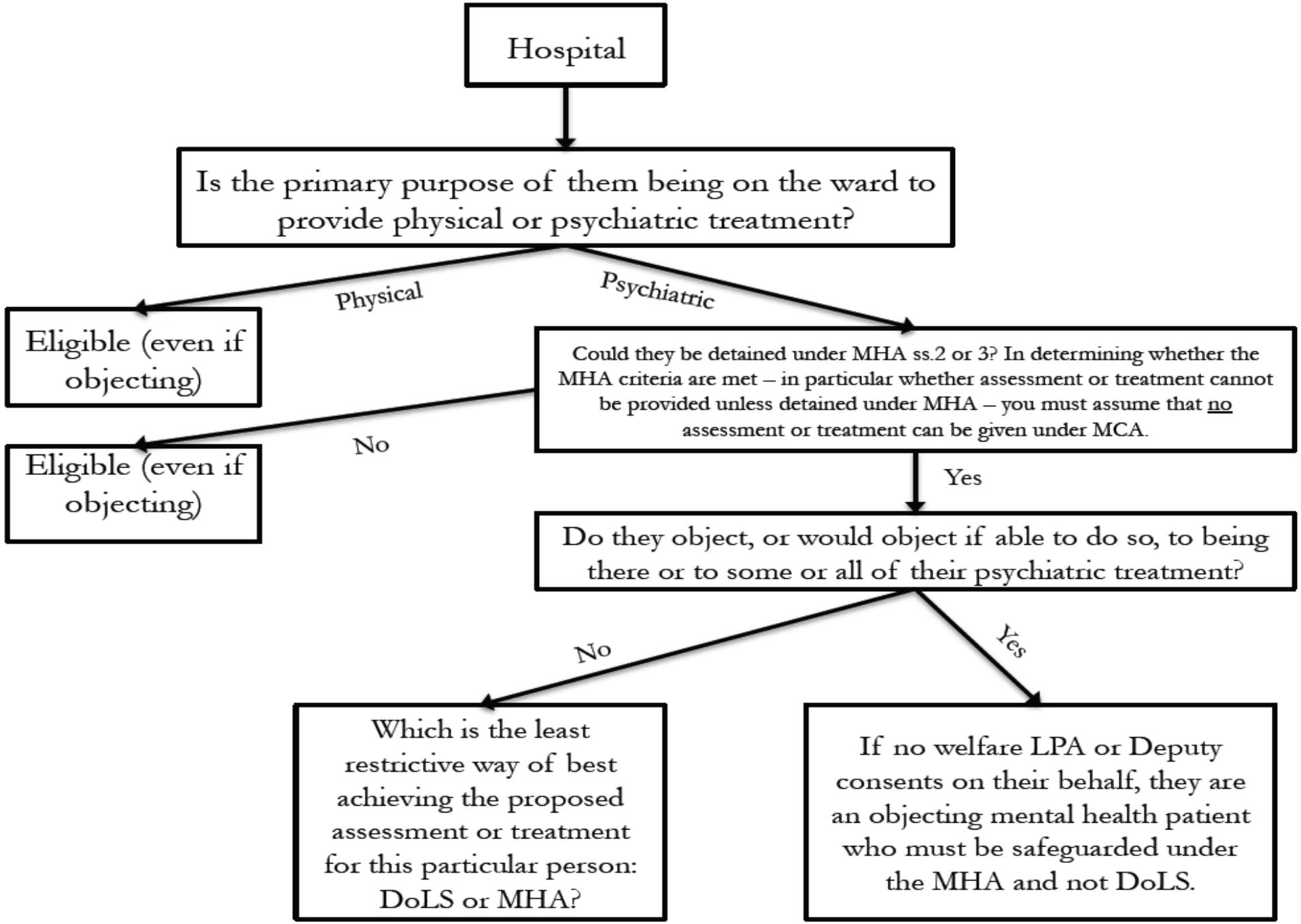
- Peter, 92, has dementia. He has been admitted to an acute hospital setting with a chest infection. He has been assessed as lacking capacity to give valid consent to his admission. He is very confused and disorientated and doesn't understand that he is in hospital or that he needs treatment for this chest infection. He is resistive to all care interventions and has made several attempts to leave the ward, saying that he needs to get back home because he is the main carer for his wife (who is sadly no longer alive). Due to his persistent attempts to leave, he is placed under one-to-one supervision and a DoLS authorisation is requested by the ward manager.
- **Would Peter be eligible for DOLS?**

Case study - Peter

- Peter would be eligible for DoLS, even though he is in hospital with a mental disorder, objecting to care/treatment and refusing to stay on the ward.
- This is because he only needs to be kept (or detained) in hospital for treatment of a physical health problem (chest infection). He doesn't need to be detained for treatment of his mental disorder (dementia), so the MHA is not applicable.
- **But what if Peter was being given medication for both his chest infection and dementia and he was objecting to taking this medication, necessitating the need to give it covertly – what Act should we apply in these circumstances?**

Case study - Peter

- The key question to ask is: **"What is the primary purpose of the admission and care/treatment?"**
- If it is to treat the chest infection and there would be no need to keep Peter in hospital once he has recovered from this infection, despite the fact that he has dementia, then DoLS will be applicable.
- But if it becomes clear that the treatment for the chest infection is secondary to the treatment he needs because of his dementia, and he is objecting to his admission to hospital and/or this care and treatment, then he may well be ineligible for DoLS and detention under the MHA should be considered instead…


Hospital
Is the primary purpose of them being on the ward to provide physical or psychiatric treatment?
Physical
Psychiatric
Eligible (even if objecting)
Could they be detained under MHA ss.2 or 3? In determining whether the MHA criteria are met – in particular whether assessment or treatment cannot be provided unless detained under MHA – you must assume that no assessment or treatment can be given under MCA.
No
Eligible (even if objecting)
Yes
Do they object, or would object if able to do so, to being there or to some or all of their psychiatric treatment?
No
Yes
Which is the least restrictive way of best achieving the proposed assessment or treatment for this particular person: DoLS or MHA?
If no welfare LPA or Deputy consents on their behalf, they are an objecting mental health patient who must be safeguarded under the MHA and not DoLS.

Circumstances where the MHA must be applied (MCA/DoLS not available)

- First of all, it is important to point out that *"a person who lacks capacity to consent to being accommodated in a hospital for care and/or treatment for mental disorder and who is likely to be deprived of their liberty should never be informally admitted to hospital (whether they are content to be admitted or not)"*. (MHA CoP for England, 13.52)
- So, if an incapacitated person needs to be detained in hospital for treatment of their mental illness, either the MHA or DoLS should be used to authorise this deprivation of their liberty.
- There are certain cases where the MHA has to be applied to authorise a deprivation of liberty in a hospital setting, because the person will be ineligible for DoLS.
- We will examine these cases first, before looking at when there is a choice between the two regimes…

Circumstances where the MHA must be applied (MCA/DoLS not available)

- The DoLS code of practice (4.45) states that:

"If the proposed authorisation relates to deprivation of liberty in a hospital wholly or partly for the purpose of treatment of a mental disorder, then the relevant person will not be eligible if:

- *they object to being admitted to hospital, or to some or all of the treatment they will receive there for a mental disorder, and*
- *they meet the criteria for an application for admission under section 2 or section 3 of the MHA (unless an attorney or deputy, acting within their powers, had consented to the things to which the person is objecting)."*
- Going back to the case of Peter, this would be applicable if he was primarily kept in hospital to be given care and treatment for his mental disorder - dementia - and he was objecting to this.

What counts as objection?

- This is by far the point that causes the most confusion among professionals, as it all hinges on whether the person is objecting or not, and views on what should be considered an objection differ.

- **Let's discuss these examples:**

1. If a person is trying to leave the ward because they don't understand where they are, does it mean that they are objecting to being there, or that they are just confused and not truly objecting?
2. What if a person is not trying to leave, but is resistant to elements of their care, such as personal care, should they be seen as objecting?
3. And what if the person no longer needs 'active treatment for a mental disorder', but is awaiting discharge and is objecting to being on the ward, should they be detained under the MHA?

What counts as objection?

These are all real dilemmas for decision makers. The MHA code of practice for England (13.51) provides the following guidance (Similar guidance is provided in the MHA CoP for Wales (13.35-13.38)):

- *"Whether a patient is objecting has to be considered in the round, taking into account all the circumstances, so far as they are reasonably ascertainable. The decision to be made is whether the patient objects, the reasonableness of that objection is not the issue. In many cases the patient will be perfectly able to state their objection. In other cases the relevant person will need to consider the patient's behaviour, wishes, feelings, views, beliefs and values, both present and past, so far as they can be ascertained.*

- *"In deciding whether a patient objects to being admitted to hospital, or to some or all of the treatment they will receive there for mental disorder, decision makers should err on the side of caution and, where in doubt, take the position that a patient is objecting."*

Where the MHA could still be applied even if P is not objecting

The DoLS code of practice (4.48) further states:

"Even where a person does not object and a deprivation of liberty authorisation is possible, it should not be assumed that such an authorisation is invariably the correct course. There may be other factors that suggest that the Mental Health Act 1983 should be used (for example, where it is thought likely that the person will recover relevant capacity and will then refuse to consent to treatment, or where it is important for the hospital managers to have a formal power to retake a person who goes absent without leave). Further guidance on this is given in the Mental Health Act 1983 code of practice."

What is classed as "treatment for a mental disorder"?

- For the purpose of the MHA, treatment for mental disorder includes nursing care (MHA code of practice 23.2) and any other "*medical treatment which is for the purpose of alleviating, or preventing a worsening of, a mental disorder or one or more of its symptoms or manifestations*" (MHA CoP 23.3).
- Individuals who are presenting with signs and symptoms of dementia or have a confirmed diagnosis of dementia will fall within the MHA's definition of mental disorder (MHA CoP 14.120).
- **Therefore any nursing care given to inpatients with dementia, such as personal care, should be classed as treatment for mental disorder**.
- Arranging appropriate **aftercare** is also part of care/treatment for mental disorder.
- And as the guidance in the MCA CoP 13.51 clearly state, if a person is objecting to their admission or to any part of their treatment for mental disorder, ***decision-makers should err on the side of caution and, where in doubt, take the position that a patient is objecting.***

Circumstances where the MHA must be applied (MCA/DoLS not available)

- One last area to highlight where the MHA should be applied as opposed to DoLS is set out in the DoLS code of practice (4.50 and 4.51):

"If the proposed authorisation relates to deprivation of liberty in a hospital wholly or partly for the purpose of treatment of mental disorder, then the person will also not be eligible if they are:

- *currently on leave of absence [section 17 leave] from detention under the Mental Health Act 1983,*
- *subject to supervised community treatment, or*
- *subject to conditional discharge,*

in which case powers of recall under the Mental Health Act 1983 should be used.

"People on leave of absence from detention under the Mental Health Act 1983 or subject to supervised community treatment or conditional discharge are, however, eligible for the deprivation of liberty safeguards if they require treatment in hospital for a physical disorder."

Circumstances where decision makers have a choice between the MHA and MCA

This would mainly be in the case of the *'compliant incapacitated psychiatric inpatient'* as clarified in *AM v South London & Maudsley NHS Foundation Trust & Secretary of State for Health [2013]* UKUT 0365 (AAC). The MHA code of practice for England has now incorporated guidance from this case law, which is set out in ch 13 as the cases where and individual is:

- *a. is suffering from a mental disorder (within the meaning of the Act [MHA])*
- *b. needs to be assessed and/or treated in a hospital setting for that disorder or for physical conditions related to that disorder (and meets the criteria for an application for admission under sections 2 or 3 of the Act [MHA])*
- *c. has a care treatment package that may or will amount to a deprivation of liberty*
- *d. lacks capacity to consent to being accommodated in the relevant hospital for the purpose of treatment, and*
- e. *does not object to being admitted to hospital, or to some or all the treatment they will receive there for mental disorder.*

Circumstances where decision makers have a choice between the MHA and MCA

- For those individuals who fall within categories (a) to (e), in principle a DoLS authorisation (or potentially a Court of Protection order) and detention under the Act [MHA] would both be available (subject to the assessments required for a DoLS authorisation, including the eligibility assessment).

- Decision makers should consider which regime is the most appropriate, taking into account further guidance from the AM v SLAM [2013] case law, which can be summarised from the MHA code of practice as…

When deciding which regime is the most appropriate, MHA CoP advises that we should consider:

- The choice of using the MHA or MCA (including DoLS) should never be based on the decision maker's general preference for one regime or the other, or because they are more familiar with one of these regimes (MCA, code of practice 13.58).
- The key consideration should be which regime would be less restrictive for that person, balanced against any potential benefits associated with the other regime.
- It is important to note that one regime is not generally less restrictive than the other, as both regimes are based on the need to impose as few restrictions on the person's liberty and autonomy as possible (MCA, code of practice 13.58).
- Therefore, the decision maker will need to consider the person's individual circumstances – what may be a less restrictive regime for one person, may not necessarily be the less restrictive regime for another.

When deciding which regime is the most appropriate, MHA CoP advises that we should consider…

- Both regimes provide appropriate procedural safeguards to protect the person's rights during their detention. Therefore, decision makers should not view one regime as generally offering better safeguards than the other.
- However, the nature of the safeguards under each regime is different and the decision maker must consider which safeguards are more likely to best protect the interests of the person, depending on their individual circumstances (MCA, code of practice 13.59).
- Where detention under the MHA and a DoLS authorisation or Court of Protection order are available, the MHA code of practice does not aim to prescribe to the decision maker which one to choose, but rather to consider the unique circumstances of each case in light of the above guidance and clearly record the reasons for their final decision as to which regime would be **most appropriate in each individual case** (MHA code of practice for England, 13.61).

Final reminder about when MHA will "trump"

1. Admission to hospital (any);
2. For treatment (includes assessment) of mental disorder;
3. Meets the criteria of the MHA; and
4. The patient is objecting and/or risk to others.

The general principle: ***If (1) to (4) are present you must use the MHA***
("But for" test – GJ case law)

But you could still use the MHA if only first 3 points are present.

This is where there is a choice between MCA/DOLS and the MHA
("Compliant incapacitated MH patient" – AM v SLAM case law)

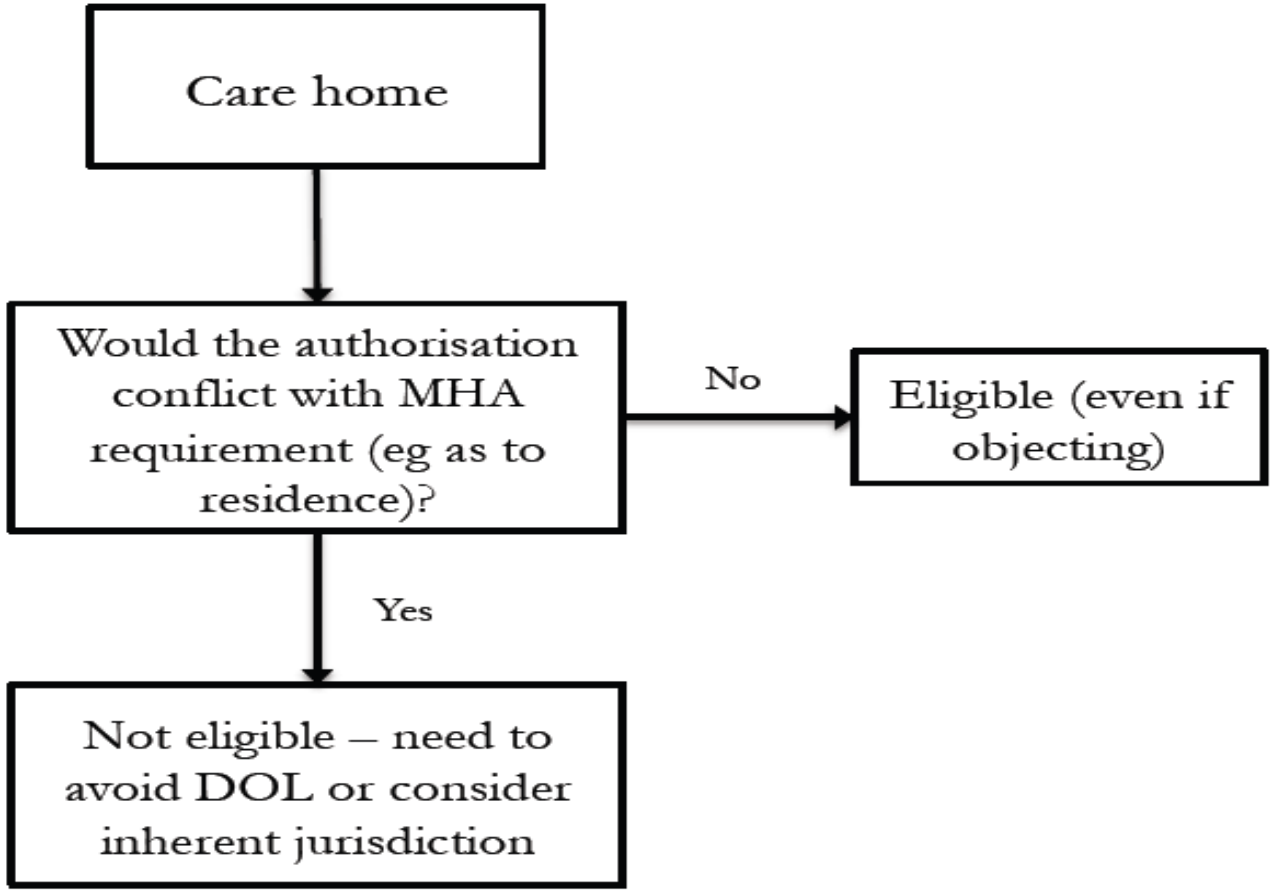
MHA/MCA Interface in the community setting

- MHA can also be extended to community settings, which includes guardianship (MHA section 7), community treatment orders (CTOs) (MHA sections 17A-17G), conditional discharge (MHA section 41) and leave of absence from detention under the MHA (MHA section 17 leave).
- However, none of these orders authorise care or treatment without consent, or that amounts to a deprivation of liberty (apart from CTOs, which will be discussed in more detail later).
- Therefore, the person has to either consent to the care or treatment or, if they lack capacity to consent, the care or treatment should be provided in their best interests under the MCA.
- Where this amounts to a deprivation of that person's liberty, in a care home or hospital, authorisation under DoLS must be sought.
- In other settings, such as private homes and supported living, authorisation from the Court of Protection must be sought.

MHA/MCA Interface in the community setting

- Authorisation under DoLS can be granted alongside these relevant orders, as long as the person meets the eligibility criteria for DoLS and on the condition that the DoLS authorisation does not conflict with (or is *"inconsistent with"*) any of these orders under the MHA.
- An example would be where a DoLS authorisation has been requested to keep a person in care home A, but the person's guardian (under the MHA guardianship) has made the decision that they should live in care home B. Therefore, a DoLS authorisation cannot be granted to deprive the person of their liberty in care home A, as this would be in conflict with or be inconsistent with the guardian's decision. But authorisation could be granted for care home B, as this would be in line with the guardian's decision.

ADASS Guidance on eligibility assessment



Case law on Guardianship and s17 leave:

- In *GW v Gloucestershire CC* [2016] UKUT 499 it was confirmed that guardianship does not allow a deprivation of liberty and if the care plan is amounting to this, then authorisation under DOLS or a court order needs to be sought.

- In *A Hospital NHS Trust v CD and a Mental Health Foundation Trust* [2015] EWCOP 74, woman with paranoid schizophrenia detained under MHA section 3 needed to be transferred to a general hospital for a hysterectomy because of a large ovarian growth. The judge found that it would be lawful to place a her on section 17 leave and then use DOLS to detain her in a general hospital for physical health treatment.

Case law on conditional discharge and CTOs:

- The *Re: MM and PJ [2017] EWCA Civ 194* judgment examined deprivation of liberty for those on conditional discharge (MM) and community treatment orders (PJ). It was confirmed that a conditional discharge itself does not provide authority to deprive a person of their liberty; for those who lack capacity to consent, a DoLS authorisation (for hospitals/care homes) or Court of Protection order (for elsewhere) must be sought.

- The decision around community treatment orders was controversially that a CTO can authorise a deprivation of liberty in the community without, therefore, the need for additional protection of the MCA/DOLS, but Supreme Court handed down new judgment in the case of PJ on 17/12/2018. It has been established that a CTO cannot be used to deprive a person of liberty.

- The full judgement can be found here: https://www.bailii.org/uk/cases/UKSC/2018/66.html

Any questions?

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