Bristol, North Somerset and South Gloucestershire CCG

Mental Capacity Act & Deprivation of Liberty Safeguards Policy

2018-2020

Please complete the table below: *To be added by corporate team once policy approved and before placing on website*	
Policy ref no:	16
Responsible Executive Director:	Anne Morris, Director of Nursing and Quality
Author and Job Title:	Paulette Nuttall Head Safeguarding Adults
Date Approved:	November 2018
Approved by:	Governing Body
Date of next review:	2020

Policy Review Checklist

	Yes/ No/NA	**Supporting information**
Has an Equality Impact Assessment Screening been completed?	Yes	
Has the review taken account of latest Guidance/Legislation?		
Has legal advice been sought?	Yes	
Has HR been consulted?		
Have training issues been addressed?	Yes	
Are there other HR related issues that need to be considered?		
Has the policy been reviewed by JCC?		
Are there financial issues and have they been addressed?	No	
What engagement has there been with patients/members of the public in preparing this policy?		
Are there linked policies and procedures?	Yes	• Safeguarding Adults and Children's Policy • Human Rights (HRA) 1998

	Yes/ No/NA	Supporting information
		• Mental Capacity Act (MCA) 2005 • Disability Discrimination Acts (DDA) 1995 and 2005 • Equality Act (EA) 2010
Has the lead Executive Director approved the policy?		
Which Committees have assured the policy?		
Has an implementation plan been provided?		Monitored by Internal Audit
How will the policy be shared with: • Staff? • Patients? • Public?		BNSSG CCG's Website internal and external
Will an audit trail demonstrating receipt of policy by staff be required; how will this be done?		Internal Audit

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Contact Names for Guidance and Information		
Name	Contact Numbers and emails	Role
BNSSG CCG Paulette Nuttall Head of Safeguarding Adults	Tel: 0117 900 2280 M: 07825231146 Paulette.nuttall@nhs.net	For advice and support to all CCG staff and GPs Safeguarding Adults Mental Capacity Act Prevent Training and Policy
BNSSG CCG Lucy Muchina	Mobile: 07990562023 lmuchina@nhs.net	
BNSSG CCG MARAC Health Professional	Tel: 0117 900 2385 email: bristolccg.marac@nhs.net	For advice and support for GPs with regards to the Domestic Violence and MARAC process
BNSSG CCG Jo Kapp	Tel: 0117 900 2263 Work Mobile: 07785925984 Jo.kapp@bristolccg.nhs.uk	For advice and guidance in relation to Deprivation of Liberty Domestic DOLs (only)
BNSSG CCG Pippa Stables Safeguarding Adults GP Lead	In South Plaza Bristol on Thursdays Reception Tel: 0117 976 6600 or email bnssg.safeguarding@nhs.net	For advice and support for GPs
Bristol City Council Johnson Koikkara MCA and DOLs Coordinator	Tel: 0117 903 6580 M: 07584140678 johnson.koikkara@bristol.gov.uk https://www.bristol.gov.uk/en_US/social-care-health/deprivation-liberty-safeguards	For advice and guidance in relation to the application of the Mental Capacity Act and Deprivation of Liberty Safeguards
North Somerset Council	https://www.n-somerset.gov.uk/my-services/socialcare/health/mental-health/deprivation-of-liberty/ DOLS.service@n-somerset.gcsx.gov.uk 01275 888 801	
South Gloucestershire Council	https://www.gloucestershire.gov.uk/gsab/i-am-a-professional/deprivation-of-liberty-safeguards-dols/making-a-dols-application/ DoLS Service (Opening hours: 09.00 - 17.00 Monday - Friday) Telephone: 01452 426005	
Police	In an emergency call 999	Immediate danger, crime in progress.
Police	Call 101	Non-emergency events when a crime has already been committed.
Care Quality Commission	Tel: 03000 616161 Email www.cqc.org.uk	For General Enquiries

Bristol, North Somerset and South Gloucestershire CCG

Mental Capacity Act & Deprivation of Liberty Safeguards Policy

2018-2020

1 Introduction

The Mental Capacity Act (MCA) consolidates human rights law for people who may lack the capacity to make their own decisions. It promotes the empowerment of individuals and the protection of their rights. The Act applies to anyone aged over 16 years or over in England and Wales and is relevant for both care and treatment decisions. The decision MCA is supported by the code of practice and health and social care staff.

The Act is built on five statutory principles that guide and inform decision-making in respect of the estimated two million people who may lack the capacity for decision-making in some aspects of their life including their health care.

The MCA 2005 Key Principles

- **A presumption of capacity** – every adult has the right to make his or her own decisions and must be assumed to have the capacity to do so unless it is proved otherwise
- **Support individuals to make their own decisions to make their own decisions** – people must be given all appropriate help before anyone concludes that they cannot make their own decisions.
- **Right to make an unwise decision-** People have the right to make what others might regard as an unwise or eccentric decision. Everyone has their own values, beliefs and preferences which may not be the same as those of other people. You cannot treat them as lacking capacity for that reason.
- **Best interest** – anything done for or on behalf of people without capacity must be in their best interests
- **Least restrictive option** – anything done for or on behalf of people without capacity should be the least restrictive

The MCA is the essential and required framework for both health and social care commissioners and practitioners, particularly when working with people, who may be

unable to, permanently or temporarily, take some or all decisions, about their care and treatment.

Through a good understanding of the Act, providers and commissioners can ensure that appropriate assessments of capacity are carried out and that decisions made on behalf of incapacitated people are in their best interests.

The Act is part of a framework within which healthcare providers should be working to ensure they respect patients' dignity and human rights. This framework includes:

- Human Rights (HRA) 1998
- Mental Capacity Act (MCA) 2005
- Disability Discrimination Acts (DDA) 1995 and 2005
- Equality Act (EA) 2010

The MCA is rights legislation. It protects the rights of all patients to take as many decisions about themselves for as long as possible. It places on staff a duty to help patients make decisions for them. If they cannot it sets out a clear and challenging process for determining whether patients have the capacity and if they do not how decisions should be made on their behalf.

The Act lays down the firm principle that because a patient cannot make a particular decision it does not automatically follow they cannot make the next one required of them.

The Act is supported by Code of Practice available on the CCG website. The Code of Practice has statutory force, which means healthcare and social care staff have a legal duty to regard it when working with or caring for adults who may lack the capacity to make decisions for themselves.

2 Purpose of this policy

This policy is written for both commissioners of NHS services and GPs and their practice staff and will:

a) Outline the role and responsibilities of the CCG in ensuring that providers of healthcare understand the Act.

and

b) Provide guidance for GPs and their practice staff in the assessment of mental capacity. The policy will make it clear when a formal capacity assessment will be required and provides documentation to be used.

3 Role of Clinical Commissioning Groups

Bristol, North Somerst and South Gloucestershire(BNSSG)CCGs will need assurance that the Act is embedded in the work of provider organisations working with patients.

BNSSG CCGs will ensure that:

- the Act is given a high profile and priority within the CCG.
- compliance and what needs to be done to achieve this is a key part of tendering and contract award
- ongoing compliance is monitored in detail through performance review and quality monitoring processes

3.1 The Mental Capacity Act is important to BNSSG CCGs because

1. CCGs will wish to be assured that the services they are commissioning on behalf of local populations are being delivered in a way that both respects and applies the rights of individual patients and in particular those that are vulnerable and may not be able to take decisions on their own behalf

2. In certain circumstances failure to provide care within the framework set down by the Act could be deemed to be unlawful. While the provider organisation is primarily responsible for acting within the law the commissioner could also be found to be equally liable

3. As part of their authorisation process, CCGs were requested to have a lead for the MCA, supported by training and policies. CCGs may need to demonstrate to their Local Area Team how the Board has discharged this duty

Commissioners are seeking evidence of an embedded cultural shift within organisations. Clinical engagement should be rights-based. Decisions should be made on the basis that patients have a right to make their own decisions and this should only be removed as the exception and only on clear evidence that the assumption of capacity is put aside and in accordance with the framework set down in the Act.

3.2 Duties and Responsibilities

3.2.1 Designated MCA Lead

CCGs are required to have a Designated MCA Lead who is responsible, on behalf of the CCG, for ensuring that it commissions appropriate health care, in compliance with the MCA. The MCA Lead should

- Provide support and guidance to clinicians in individual cases;
- Provide and secure the provision of training regarding the MCA, where required;
- Supervise staff in areas where capacity and treatment issues may be particularly prevalent and or complex;
- Participate in the auditing process to ensure that services commissioned are compliant with the MCA and report results through the governance structure appropriately.

3.2.2 Co-commissioning arrangements

Under the delegation arrangements, the CCG will be responsible for ensuring that GP services commissioned have effective MCA arrangements in place before CCGs take on such responsibility. The overall effectiveness of the CCG in discharging its duties will be monitored as part of the CCG Assurance process.

3.3 Monitoring Compliance and Effectiveness

The CCG will require assurance that all provider organisations have policies, training programmes and governance structures that are compliant with the MCA.

3.3.1 Policy

The CCG may request the following documentation from provider organisations, to demonstrate that their policies are compliant with the MCA:

- Copies of service providers' MCA policies (including policies relating to Advanced Decision Making, Advocacy and Supported Decision Making)
- Evidence that each hospital and other providers have a MCA lead.
- Written evidence of MCA-compliant capacity assessments and best interests decision-making documentation and procedures.
- Evidence that rights of patients and compliance with the Act are being recognised and actioned within care planning policies, guidance and training.
- Evidence that the MCA is linked into the hospital's systems and processes relating to improving service users' experience and the quality of their care and treatment.
- Policies on research recognise the rights of those lacking capacity.

3.3.2 Training

The CCG may request the following evidence from provider organisations, to demonstrate that their training policies and procedures are compliant with the MCA:

- A copy of the service provider's training, induction and refresher training policy.
- The sight of summary reports on staff induction, training and refresher training records including attendance records.
- Assurance that the MCA features in the job descriptions and personal development reviews of all staff working directly with patients.

- Arrangements for training on restriction and restraint and associated recordkeeping. (CCGs will pay particular regard to restraint being proportionate to the harm that it seeks to prevent).
- How MCA-related case laws explained to staff and how
- Evidence that staff are familiar with the Code of Practice and have easy access to it when seeking guidance.

The CCG will be able to monitor this through the Safeguarding Adults Standards for Commissioned services 2017-19. Also, the CCG can request evidence of compliance through service conditions 9, 1, 12, 13 and General Condition 5.

Details of the Mental Capacity Act and Deprivation of Liberty Safeguarding Training for CCG Staff can be found at Appendix 6.

3.3.3 Governance

The CCG may request the following documentation from provider organisations, to demonstrate that their governance structures are compliant with the MCA:

- Evidence of the MCA featuring in audit programmes.
- Evidence of the involvement of clinical governance processes in best interests decision-making through audit and reviews. This would demonstrate how the guidance given in the Code is being applied in practice.
- Board reports on the management and treatment of people lacking capacity.
- Information on how often and in what way the hospital seeks legal advice in relation to the Court of Protection and potential referrals to the Court.
- Evidence that the MCA is linked into the hospital's systems and processes relating to improving service users' experience and the quality of their care and treatment.
- Copies of extracts from CQC reports relating to compliance with the MCA.
- Evidence that legal advisors are familiar with the MCA, up to date with case law and are advising the service provider accordingly.

4 Deprivation of Liberty[1]

Article 5 of the European Convention on Human Rights states (ECHR)

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save... in accordance with a procedure prescribed by law."

4.1 Identifying a Deprivation of Liberty – The Acid Test

The MCA gives certain responsibilities to staff caring for an adult at risk who lack the capacity to consent to their care and treatment to use restriction and restraint where it is in the best interests of the person and is necessary to prevent harm. If, however, that restriction and restraint move towards depriving that person of their liberty it could be unlawful unless authorised by the relevant local authority following an assessment process determined in law.

In determining whether a deprivation of liberty is occurring, or is likely to occur, all the facts in a particular case need to be considered.

The Supreme Court has clarified that there is a deprivation of liberty for the purposes of Article 5 of the ECHR in the following circumstances;

- the person is under continuous supervision and control

and

- is not free to leave

and

- the persons lack the capacity to consent to these arrangements.

Every effort should be made, in commissioning and providing care or treatment, to prevent a deprivation of liberty. Where a potential deprivation of liberty is identified, a full exploration of the alternative ways of providing care and/or treatment should be undertaken, in order to identify any less restrictive option.

Where the plan for an individual lacking capacity will unavoidably result in a deprivation of liberty determined to be in the person's best interests, this must be authorised either by the Deprivation of Liberty Safeguards (DoLS) or an application to the Court of Protection.

4.2 Deprivation of Liberty Safeguards

The Deprivation of Liberty (DoLS) Safeguards, within the MCA, provide a legal protective framework for authorising the deprivation of liberty of vulnerable/at risk

[1] Details of the Mental Capacity Act (2005) Best Interest and Decision making pathways can be found at Appendices 1 and Appendix 2 and a Deprivation of Liberty Flowchart at Appendix 3.

people who lack capacity and are deprived of their liberty in a care home or hospital but are not detained under the Mental Health Act 2005.

The DoLS apply to people 18 years old and above; in hospitals and care homes (whether privately or publicly funded) and their purpose is to prevent arbitrary decisions that deprive vulnerable people of their liberty. In the event of it being necessary to deprive a person of their liberty the safeguards give them rights to representation, appeal and for any authorisation to be monitored and reviewed.

The DoLS cannot be used where:

- The person is under 18
- The person is not residing in a care home or a hospital
- The person has made a valid and applicable Advance Decision refusing a necessary element of treatment for which they were admitted to hospital;
- The use of DOLS would conflict with a decision of the person's Attorney or Deputy of the Court of Protection.

The Deprivation of Liberty Safeguards means that a 'managing authority' (i.e. the relevant hospital or care home) must seek authorisation from the 'supervisory body' (the local authority). The managing authority must apply for this authorisation and the supervisory body must consider this request.

There are two types of authorisation: standard and urgent. A managing authority must request a standard authorisation when it appears likely that, at some point during the next 28 days, someone will be accommodated in its hospital or care home in circumstances that amount to a deprivation of liberty within the meaning of Article 5 ECHR. The request must be made in writing to the supervisory body and a standard authorisation given within 21 days.

Where it has not been possible to obtain authorisation in advance and the managing authority believes it is necessary to deprive someone of their liberty in their best interest before the standard authorisation process can be completed, the managing authority must itself give an urgent authorisation and then obtain standard authorisation within 7 days.

DoLS and intensive care

Most patients in intensive care units lack mental capacity to inform decision-making, whether because of drugs or disease. The use of patient restraints (physical, mechanical or pharmacological) is commonly deployed, under the auspices of relevant legislation, to facilitate safe intensive care.

The Court of Appeal held in 2017 ruled that “in general” there can be no deprivation of liberty under human rights law in cases where a person is receiving life-saving medical treatment.

4.3 Deprivation of Liberty in Domestic Settings – Court of Protection

Where people are deprived of their liberty in settings other than hospitals and care homes (i.e. in supported living, shared lives schemes) and the state is responsible for imposing such arrangement, the deprivation can only be approved by the Court of Protection

Therefore if a person, fully NHS funded in a domestic setting by the CCG under Continuing Healthcare, is being or is likely to be deprived of their liberty within the meaning of Article 5 ECHR, an application for authorisation should be made to the Court of Protection.

5 MCA Guidance for General Practitioners and Practice Staff

5.1 Supporting the person in decision making

It is important to consider the following when supporting patients to make decisions:

- Does the patient have all of the relevant information they need to make the decision?
- Have they been given information on all of the alternatives available to them?
- How does the patient communicate? Patients can communicate in a variety of ways, including non-verbal. Consider if they need an interpreter/ specialist equipment/ adapted information leaflets such as easy read.
- Have you considered what time of day is best for the patient to make a decision? Is there a particular place where the patient feels most comfortable? Would they like someone with them to support with this, such as a family member/carer or independent advocate?

It is essential not to assess someone's understanding before they have been given relevant information about a decision. Every effort must be made to provide information in a way that is most appropriate to help the person to understand.

Quick or inadequate explanations are not acceptable unless the situation is urgent.

Relevant information includes:

- The nature of the decision
- The reason why the decision is needed, and
- The likely effects of deciding one way or another, or making no decision at all.

Where the decision is determining a range of options, relevant information will include the key factors/issues and the risk and benefits of each option. The relevant

professional will need to be aware of the concrete details of any alternative options, in order that they can outline them.

Health and social care workers must be clear that mental capacity is decision and time specific. Therefore a patient may be able to make a decision about having their blood pressure taken but they may lack capacity in relation to their wound care.

5.2 What happens in an emergency?

In an emergency situation, urgent decisions will have to be made and immediate action taken in the person's best interests. In these situations, it may not be practical or appropriate to delay the treatment while trying to help the person make their own decisions, or to consult with any known attorneys or deputies. However, even in emergency situations, healthcare staff should try to communicate with the person and keep them informed of what is happening.

5.3 When is a Capacity Assessment required?

The legal starting point is the presumption that an adult (aged over 16) has the mental capacity to make decisions for themselves.

Evidence to the contrary needs to be gathered to establish mental incapacity before decisions can be made and actions taken on behalf of the adult in their best interests. It is also important that the person who does an assessment can justify their conclusions.

An assessment of capacity should be completed at any time where there is a concern that the patient may not be able to make an informed decision. This may be at the point when seeking consent for a non-invasive procedure like taking a patient's blood pressure, or for an invasive treatment such as treatment of a pressure sore or insertion of a catheter. It is essential that staff appropriately assess capacity and evidence this for all decisions when it is felt that there is doubt regarding the patient's capacity.

For significant decisions such as invasive treatments, with the risk of side effects, it is advised that a formal assessment is completed using the assessment of capacity form **(see Appendix 4)** If you choose not to use any of the templates provided you must ensure you evidence your assessment and how the decision was reached. It is not acceptable to just record that a capacity assessment was completed and the outcome of this.

5.4 Who undertakes the assessment of Mental Capacity?

The person who assesses a patient's capacity to make a decision will usually be the person who is directly concerned with the individual at the time the decision needs to be made.

This means that different people will be involved in assessing someone's capacity to make different decisions at different times.

Usually, healthcare professionals are the assessors for actions for which they are responsible. This means that a doctor will likely be the assessor of someone's capacity for the treatment they are prescribing; a nurse will likely be the assessor for the treatment or care they are delivering; a care assistant will likely be the assessor for activities of daily living such as washing and dressing.

In no circumstances should healthcare professionals express an opinion about a person's capacity without carrying out a proper examination and assessment of that person's capacity to make the decision.

More complex decisions may require more formal assessments and a formal opinion. This could be, for example, from a psychiatrist, psychologist, a speech and language therapist, occupational therapist or social worker. However, the final decision about a person's capacity must be made by the person intending to make the decision or carry out the action on behalf of the person who lacks capacity – not the professional, who is there to advise.

5.5 Two stage test of Mental Capacity

The MCA states that 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 disturbance in the functioning of, the mind or brain.

A person is not to be treated as unable to make a decision unless all practicable steps have been taken to help him to do so without success

A mental capacity assessment must be decision and time specific. However, mental capacity may fluctuate and it is important to undertake the test at a time of optimal functioning e.g. being sensitive to the effects of drugs. Furthermore, some people may be able to make their own decisions but have a mental health problem or other condition, which affects their decision-making ability. It is important to allow for this in any assessment. If it is possible, the decision should be delayed until the person has recovered and regained their capacity.

A person's mental capacity may be recovered with appropriate care and treatment, meaning that follow-up assessments may be required.

The Test of Mental Capacity, as laid out in the Mental Capacity Act 2005, has two clear stages.

Stage 1 (Diagnostic Test) – Does the patient have "an impairment or disturbance of the functioning of the mind?

An impairment or disturbance of the functioning of the mind or brain may include the following (this is not an exhaustive list):

- Effects of alcohol or drugs
- All categories of mental illness including depression

- Delirium
- Head Injury
- Dementia
- Learning Disability
- Brain injury

Stage 2 (Functional Test) – Is the impairment or disturbance sufficient to cause the person to be unable to make that particular decision at the relevant time?

Anybody who claims that an individual lacks capacity due to an impairment or disturbance of the functioning of the mind should be able to provide proof.

They need to be able to show, **on the balance of probabilities**, that the individual lacks the capacity to make a particular decision, at the time it needs to be made. This means being able to show that it is more likely than not that the person lacks the capacity to make the decision in question.

In order to establish the answer to the functional test in stage two, you must assess the following. Remembering **CURB,** can the patient:

- **Communicate** their decision (whether by talking, using sign language or any other means). Ensure you make it clear how you have tried to promote communication.
- **Understand** the information relevant to the decision (what is being proposed and why it is being suggested). This should be done in a simple and jargon freeway. The person needs to demonstrate they understand the salient points. Case law suggests that the level of understanding does not need to be of a particularly high standard; it is acceptable for the information to be understood in broad terms.
- **Retain** the information (for long enough to process the information and make an effective decision).
- **Balance** or weigh up that information as part of the process of making the decision. Can they appreciate the benefits, risks and alternatives of pursuing/not pursuing the option/s suggested.

If ALL of the above are achieved, then the person must be regarded as having the mental capacity to make his or her own decision. It should be noted that the quality or reasonableness of the person's decision is not a factor. People have the right to make decisions that others may consider to be 'unwise'.

If the person fails even one part of the test then they must be regarded as lacking mental capacity for this specific decision.

5.6 No Refusals

If a person is regarded as lacking mental capacity for a specific decision, steps should be taken to ascertain whether the person lacking capacity has made an Advanced Decision or if there is an Attorney or Court Appointed Deputy.

If any of these are present, guidance should be sought from them. If there is no Advance decision, Attorney or Court Appointed Deputy, the decision must be made in the person's best interests.

5.7 What if a patient cannot communicate?

Sometimes there is no way for a person to communicate. This will apply to very few people, but it does include:

- People who are unconscious or in a coma, or
- Those with the very rare condition sometimes known as ‘locked-in syndrome, who are conscious but cannot speak or move at all.

If a person cannot communicate their decision in any way at all, the Act says they should be treated as if they are unable to make that decision.

5.8 Record keeping and professional liability

The MCA provides legal protection from liability for carrying out certain actions in connection with the care and treatment of people who lack the capacity to consent, provided that:

- You have observed the principles of the Mental Capacity Act
- You have carried out an assessment of capacity and reasonably believe that the person lacks capacity in relation to the matter in question; and
- You reasonably believe the action you have taken is in the best interests of the person.

It is important to keep a full record of what has happened. The protection from liability will only be available if you can demonstrate that you have assessed capacity, reasonably believe it to be lacking and then acted in what you reasonably believe to be in the person’s best interests.

You can use the templates provided in Appendix 4 and Appendix 5 to record assessments of capacity and best interest decisions. Appendix 4 can be used alongside a care plan for day to day tasks (e.g administration of medication); this must include a review date. All completed templates should be filed in the person's medical notes.

If you do not use the suggested templates, you must ensure that you write a clear and thorough account of your assessment in the person's medical / nursing records. Section 13.22 of the Mental Health Act 1983 Code of Practice states that the following should be documented:-

- the specific decision for which capacity was assessed
- the salient points that the individual needs to understand and comprehend and the information that was presented to the individual in relation to the decision
- the steps taken to promote the individual's ability to decide themselves. How the information was given in the most effective way to communicate with the individual
- how the diagnostic test was assessed, and how the assessor reached their conclusions, and
- how the functional test was undertaken, and how the assessor reached their conclusions.

5.9 Challenge to a Capacity Decision

A challenge to a mental capacity assessment could come from the patient, their family or from others involved in their care. If the challenge comes from the patient they may need support from others to assist in their challenge.

In the first instance, the assessor will need to make use of the information recorded on the capacity assessment form to explain why a particular decision has been made and provide objective evidence to support this.

In some situations, it may be helpful to obtain a second opinion from another professional who has not been involved in the patient's care. Where there is still disagreement then the decision maker should contact the MCA Lead at the CCG for further legal advice.

If a disagreement cannot be resolved, it may be necessary to refer the matter to the Court of Protection for a decision.

5.10 Best Interests

When a patient has been assessed as lacking capacity in relation to a specific decision, health and social care staff must ensure that any decision made on behalf of the patient is made in their 'best interests'. When making a best interests decision staff must consider:

- **Regaining capacity** – it may be appropriate to delay the decision to allow further time for additional steps to be taken to restore the person's capacity or to provide support and assistance which would enable the person to make the decision themselves.
- **Encouraging participation** – the person must be permitted and encouraged to participate as fully as possible in any act done for him/her and any decision affecting him/her. Time must be taken to try to seek their views. A trusted relative or friend, or an Independent Mental Capacity Advocate, may be able to help the person to express wishes or aspirations or to indicate a choice between different options.

- **The person's feelings and wishes** – the person making the decision must consider so far as is reasonably ascertainable, the person's past and present wishes and feelings; the beliefs and values that would be likely to influence his/her decision if he/she had capacity; and the other factors that he/she would be likely to consider if he/she were able to do so. This also includes specific views may have been set out in an Advance Directive, communicated informally to relatives and carers or formally in the Lasting Power of Attorney.

- **The views of other people** – the person making the decision must take into account, if it is practicable and appropriate to consult with them, the views of anyone named by the person as someone to be consulted on the matter in question or on matters of that kind; anyone engaged in caring for the person or interested in their welfare; any done of a Lasting Power of Attorney. You may also need to consult with other professionals involved in the patients care and also the person's Independent Mental Capacity Advocate if one is required. The best way of ensuring this consultation may be to hold a best interests meeting and invite all persons that need to be consulted.

- **Do not make assumptions** – the person making the decision must not make any assumptions about the person based on age, condition, appearance or behaviour.

5.11 Who is the decision maker?

Under the Mental Capacity Act, many different people may be required to make decisions or act on behalf of someone who lacks the capacity to make decisions for themselves.

It is the decision maker's responsibility to work out what would be in the best interests of the person who lacks capacity. Usually, the assessor of a person's capacity will also be the decision maker for determining best interests as professionals are the decision makers for actions for which they are responsible. For example, decisions relating to a person's social care needs may need to be made by a Social Worker, however, a decision relating to a person's treatment for a pressure sore or Insulin injection would be made by the Nurse delivering care at that time. With areas of medication administration, this may be carried out jointly with the person who prescribed the drug. Equally a decision relating to a patient's ability to consent to an emergency hospital admission may need to be made by a Paramedic/GP.

There may also be times where the multi-disciplinary team will make the best interests decision together.

If a Lasting Power of Attorney has been made and registered, or a deputy has been appointed under a court order, the attorney or deputy will be the decision-maker, for decisions within the scope of their authority.

5.12 What should I do if there is a dispute about best interests?

Family and friends may not always agree about what is in the best interests of an individual. If you are the decision-maker you will need to clearly demonstrate in your record keeping that you have made a decision based on all available evidence and taken into account all the conflicting views.

If there is a dispute, the following things might assist you in determining what is in the person's best interests.

- Involve an Advocate who is independent of all the parties involved.
- Get a second opinion.
- Hold a formal or informal case conference / best interests meeting
- Go to mediation.
- Seek legal advice via the Clinical Directorate
- An application could be made to the Court of Protection for a ruling

5.13 Independent Mental Capacity Advocate (IMCA)

An IMCA is a specific type of advocate that has to be involved if there is no-one appropriate who can be consulted. An IMCA is not the decision-maker, but the decision-maker has a duty to take into account the information given by the IMCA

An IMCA must be instructed if:

- The decision is about serious medical treatment provided by the NHS;
- It is proposed that the person be moved into long-term care of more than 28 days in a hospital or 8 weeks in a care home; or
- A long-term move (8 weeks or more) to different accommodation is being considered, for example, to a different hospital or care home

Practitioners are advised to consider instructing an IMCA, on behalf of a person lacking capacity, for:

- Care reviews, where no-one else is available to be consulted
- Safeguarding adult cases, whether or not family or friends are involved

Duties of the IMCA include:

- Supporting the person who lacks capacity and represent their views and interests to the decision maker;
- Obtaining and evaluating information

- As far as possible, ascertaining the person's wishes and feelings, beliefs and values;
- Ascertaining alternative courses of action
- Obtaining a further medical opinion, if necessary; and
- Preparing a report for the person who instructed them.
- Challenging the best interests decision if they disagree with the decision made by the decision maker.

http://www.bristolmind.org.uk/our-services/advocacy/independent-mental-capacity-advocacy

If you have any questions about IMCA services in Bristol please contact:
Telephone: 0117 980 0371

Fax No: 0117 927 6587

Email: imca@bristolmind.org.uk

South Gloucestershire please contact Swan at the Care Forum on 0117 958 9304

North Somerset please contact Simon Gourlay at the Friend Community Mental Health RC on 01934 622 292

5.14 Serious Medical Treatment

Serious medical treatment involves providing new treatment or withdrawing/withholding treatment where:-

- There is a fine balance between the benefits and risks of a single treatment.
- There is a choice of treatments which are finely balanced.
- The treatment proposed would likely involve serious consequences for the patient (i.e. it has a serious impact on the patient, either from the effects of the treatment itself or its wider implications).

A treatment is likely to have 'serious consequences for a patient if it

- Causes serious and prolonged pain, distress or side effects
- Has potentially major consequences for the patient (for example, stopping life-sustaining treatment or having major surgery)
- Has a serious impact on the patient's future life choices (for example, interventions for ovarian cancer)

The Court of Protection's Practice Direction 9E states that the following Serious Medical Treatment should be brought to the Court:-

- Withholding or withdrawing artificial nutrition and hydration from a person in a permanent vegetative state or a minimally conscious state;
- Cases involving organ or bone marrow donation by a person who lacks the capacity to consent; and
- Cases involving non-therapeutic sterilisation of a person who lacks the capacity to consent.

For other Serious Medical Treatment, where the patient is deemed to lack capacity, the responsible clinician must undertake a balancing exercise considering the circumstances (e.g. the views of the IMCA and family members) and the consequences for the patient, in deciding whether the matter should be brought to the Court.

Where required, the responsible Clinician should seek legal advice from their legal advisors.

Further information on Serious Medical Treatment can be found in the Court of Protection's Practice Direction 9E at:

https://www.judiciary.gov.uk/wp-content/uploads/2015/06/copd-pd-9e-serious-medical-treatment.pdf

5.15 Advance Decisions to Refuse Medical Treatment

An advance decision enables someone aged 18 and 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. The person can cancel their decision, or part of it, at any time while they have the capacity to do so.

An Advance Decision can set out what particular types of treatment they would not want to have and in what circumstances, should they lack the capacity to refuse consent to this treatment for themselves in the future. It can be about any treatment even if it may result in the person's death.

If an Advance Decision is valid and applicable it must be followed as it is legally binding and has the same force as when a person with capacity refuses treatment

An Advance Decision does not need to be in writing; except for decisions relating to life-sustaining treatment but it is helpful if it is.

5.16 Young Persons (aged 16 to 17)

Most of the Mental Capacity Act applies to young people aged 16–17 years, who may lack the capacity to make specific decisions, but there are three exceptions:-

- Only people aged 18 and over can make a Lasting Power of Attorney

- Only people aged 18 and over can make an advance decision to refuse medical treatment.
- The Court of Protection may only make a statutory will for a person aged 18 and over.

People carrying out acts in connection with the care or treatment of a young person aged 16–17 who lacks capacity will generally have protection from liability, as long as the person carrying out the act:

- Has taken reasonable steps to establish that the young person lacks capacity
- Reasonably believes that the young person lacks capacity and that the act is in the young person's best interests, and
- Follows the principles of the MCA.

When assessing the young person's best interests, the person providing care or treatment must consult those involved in the young person's care and anyone interested in their welfare – if it is practical and appropriate to do so.

This may include the young person's parents. Care should be taken not to unlawfully breach the young person's right to confidentiality.

If there is disagreement, however, about whether particular care and treatment are in the young person's best interests, it would be prudent to refer the matter to the Court of Protection.

5.17 Interface of MCA and MHA

In some circumstances, clinicians will be unsure of whether to use the Mental Capacity Act or the Mental Health Act to provide treatment to a person who lacks capacity. This is a complex area of law, however, the following guidance applies.

Detention under the Mental Health Act is not an indicator that a person is unable to make decisions about their care and treatment. If a detained person requires treatment for a physical illness or condition, that is unrelated to their mental health, and they have been assessed as lacking capacity to make the required decision, then this MCA policy must be followed.

Before making an application under the MHA, decision-makers should consider whether they could achieve their aims safely and effectively using the MCA instead.

The MHA should be considered if the person needs treatment that cannot be given under the MCA (for example, because the person has made a valid and applicable advance decision to refuse all or part of that treatment)

The MHA should be considered if the person may need to be restrained in a way that is not allowed under the MCA

Compulsory treatment under the MHA is not an option if the patient's mental disorder does not justify detention in hospital, or the patient needs treatment only for a physical illness or disability

The interaction of the MHA and the MCA is a complex area of law. Where necessary, decision-makers are encouraged to contact their legal advisors for further advice.

5.18 Covert Medication

Article 8 of the European Convention on Human Rights (ECHR) states:

1. ***Everyone has the right to respect for his private and family life, his home and his correspondence.***

2. ***There shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society… for the prevention of disorder or crime… or for the protection of health and morals…***

As the administration of medication covertly is likely to amount to an interference with a person's private life, it may amount to a breach of Article 8 ECHR.

In order to ensure that administration of covert medication is lawful and not a breach of Article 8 ECHR, the clinician involved must ensure that the principles of the Mental Capacity Act are followed.

- There must be a capacity assessment evidencing that the person lacks the capacity to make decisions about their medication;

- The decision to administer medication covertly to a person must be made in their best interests. Where appropriate, a best interests meeting should be held and the MDT team and family consulted;

- Clear records should be kept with cogent reasons for all decisions made.

The administration of covert medication is controversial and any decision to administer medication covertly should be regularly reviewed to consider whether it remains the least restrictive option for the patient, and other options should be periodically considered and trialled.

Please note, that if someone is subject to a DoLS and is objecting to their treatment, the DoLS is not sufficient authority to administer medication covertly. A capacity assessment and best interests decision is required.

Where a patient is detained under the MHA, the position regarding covert medication is more complex and further legal advice should be sought from their legal advisors.

6 Equality Impact Assessment

Name of Proposal being assessed: Mental Capacity Act & Deprivation of Liberty Safeguards Policy 2018-2020

Does this Proposal relate to a new or existing programme, project, policy or service? New Policy

Lead Officer completing EIA	**Paulette Nuttall**
Job Title	**Head of Safeguarding Adults**
Department/Service	**Nursing Directorate**
Telephone number	**0117 9002280**
E-mail address	**Paulette.nuttall@nhs.net**
Lead Equality Officer	**Niema Burns**
Key decision which this EIA will inform and the decision-maker(s)	**Approval of : Mental Capacity Act & Deprivation of Liberty Safeguards Policy 2018-2020**

Step 1: Equality Impact Assessment Screening

1. Does the project affect service users, employees and/or the wider community?

The policy sets out how, as a commissioning organisation, Bristol, North Somerset and South Gloucestershire Clinical Commissioning Group will fulfil its statutory duties and responsibilities under the Mental Capacity Act & Deprivation of Liberty Safeguards.

The Policy operates in the context of all commissioned services for the population of Bristol, North Somerset and South Gloucestershire both within its own organisation and across the local health economy via its commissioning arrangements

2. Could the proposal impact differently in relation to different characteristics protected by the Equality Act 2010?

This Equality Impact Assessment screening is undertaken to ensure that the Bristol, North Somerset and South Gloucestershire Clinical Commissioning Group (BNSSG CCG) Mental Capacity Act & Deprivation of Liberty Safeguards Policy 2018-2020 meets statutory obligations under the Public Sector Equality Duty 2010.

Assessment of Impact of Proposal on Protected Characteristics				
Protected Characteristic	**Positive Impact** ✓	**Negative Impact** ✓	**Neutral Impact** ✓	**Please provide reasons for your answer and any mitigation required**
Age* eg: young adults, working age adults; Older People 60+]	✓			MCA 16 Years and above DoLS 18 years and above
Disability Physical Impairment; Sensory Impairment; Mental Health; Learning Difficulty/ Disability; Long-Term Condition	✓			This policy is consistent in its approach regardless of any disability.
Gender Reassignment [Trans people]	✓			This policy is consistent in its approach regardless of gender reassignment.
Race [including nationality and ethnicity]	✓			This policy is consistent in its approach regardless of marriage or civil partnership status.
Religion or Belief	✓			This policy is consistent in its approach regardless of religion and belief.
Sex [Male or Female]	✓			This policy is consistent in its approach regardless of sex.
Sexual Orientation	✓			This policy is consistent in its approach regardless of sexual orientation.
Pregnancy and Maternity	✓			This policy is consistent in its approach regardless of pregnancy and maternity.
Marriage and Civil Partnership	✓			This policy is consistent in its approach regardless of marriage or civil partnership status.

3. Relevance to the Public sector Equality Duty:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act 2010.

The Mental Capacity Act (MCA) consolidates human rights law for people who may lack the capacity to make their own decisions. It promotes the empowerment of individuals and the protection of their rights.

The Act is built on five statutory principles that guide and inform decision-making in respect of the estimated two million people who may lack capacity for decision-making in some aspects of their life including their health care.

The MCA is the essential and required framework for both health and social care commissioners and practitioners particularly when working with people, who may be unable to, permanently or temporarily, take some or all decisions, about their care and treatment.

Through a good understanding of the Act, providers and commissioners can ensure that appropriate assessments of capacity are carried out and that decisions made on behalf of incapacitated people are in their best interests.

The Act is part of a framework within which healthcare providers should be working to ensure they respect patients' dignity and human rights. This framework includes:

- Human Rights (HRA) 1998
- Mental Capacity Act (MCA) 2005
- Disability Discrimination Acts (DDA) 1995 and 2005
- Equality Act (EA) 2010

- Advance equality of opportunity between people who share a protected characteristic and those who do not.

The MCA is rights legislation. It protects the rights of all patients to take as many decisions about themselves for as long as possible. It places on staff a duty to help patients make decisions for them. If they cannot it sets out a clear and challenging process for determining whether patients have capacity and if they do not how decisions should made on their behalf.

The Act lays down the firm principle that because a patient cannot make a particular decision it does not automatically follow they cannot make the next one required of them.

- Foster good relations between people who share a protected characteristic and those who do not.

The Deprivation of Liberty (DoLs) Safeguards within the MCA provides a legal protective framework for those vulnerable/at risk people who are deprived of their liberty and not detained under the Mental Health Act 2005.

Article 5 of the European Convention on Human Rights states

"everyone has the right to liberty and security of person. No one shall be deprived of his liberty save... in accordance with a procedure prescribed in law."

The safeguards apply to people 18 years old and above; in hospitals and homes (whether privately or publicly funded) and their purpose is to prevent arbitrary decisions that deprive vulnerable people of their liberty. In the event of it being necessary to deprive a person of their liberty the safeguards give them rights to representation, appeal and for any authorisation to be monitored and reviewed.

People can be deprived of their liberty in settings other than hospitals and care homes such as supported living but in such cases the deprivation can only be approved by the Court of Protection and applications for authorisations in such circumstances should be made to the Court.

The MCA gives certain responsibilities to staff caring for vulnerable people who lack the capacity to consent to their care and treatment to use restriction and restraint where it is in the

best interests of the person and is necessary to prevent harm. If, however, that restriction and restraint moves towards depriving that person of their liberty it could be unlawful unless authorised by the relevant local authority following an assessment process determined in law.

4. Health Inequalities:

Does the proposal relate to an area with known Health Inequalities? No

On the basis of this screening assessment do you consider this proposal to be relevant to the General Duty or to any particular protected characteristic? General Duty

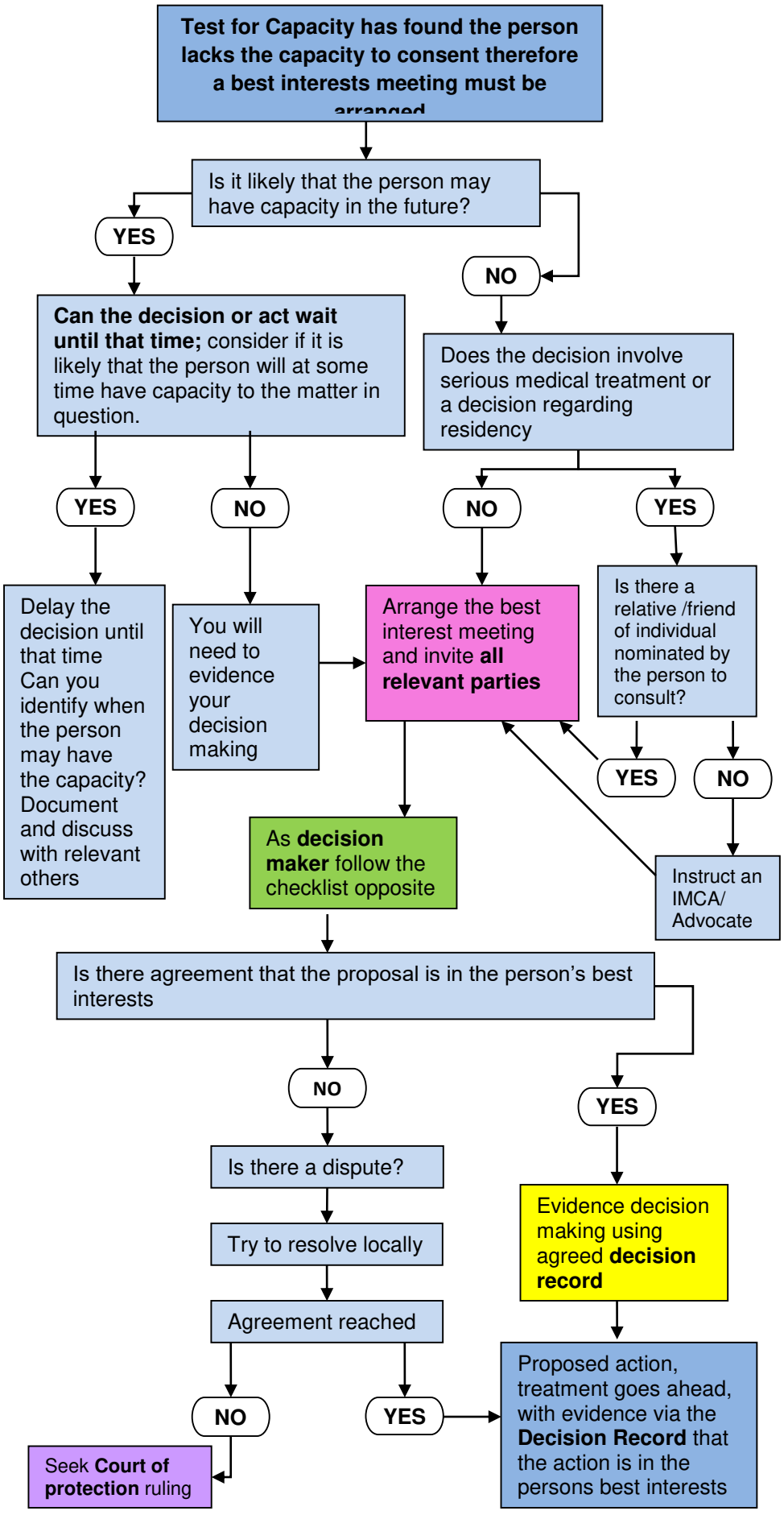
5. Conclusion:

Proceed to full EIA? **No**

Signed:  Date: 10.4.2018

Appendix 1 - Mental Capacity Act (2005) Best Interest Pathway

Principle 4 - Anything done for, or on behalf of a person who lacks capacity must be done in the persons best interests



All relevant parties; the person, GP/Doctor, carers, nurse, allied health professional, social care staff, advocate, IMCA, or people who know the person really well

The decision maker takes the responsibility to ensure that the proposed action is in the best interests of the person
The decision maker needs to check if there is an advance directive, LPA or Deputy or if there is a friend/carer of person nominated by the person to consult

The decision maker must:

- Consult with all relevant others i.e. the person, medic/GP, advocate/IMCA,carers and others involved with the person ie LPA/Deputy/EPA
- Identify the views of all relevant people in the persons life
- Not make assumptions about a persons best interests based upon the persons age, or appearance, condition or any aspect of their behaviour
- Consider all the relevant circumstances relating to the decision in question
- Involve the person as fully as possible
- Ensure that if the decision concerns the preservation of withdrawing of life sustaining treatment, the decision maker must not be motivated by a desire to bring about death
- Be able to justify and evidence their decision making
- Ensure that other least restrictive options are always explored (**please complete best interests decision record)**
  As far as possible the decision maker must consult with other people as appropriate to do so and take into account their views as to what would be in the best interests of the person lacking capacity, especially anyone previous named by the person as some one to be consulted, carers, and close relatives or friends of others involved in the persons welfare, LPA or deputy appointed by the court of protection. If it has not been possible to contact people, give details why not possible

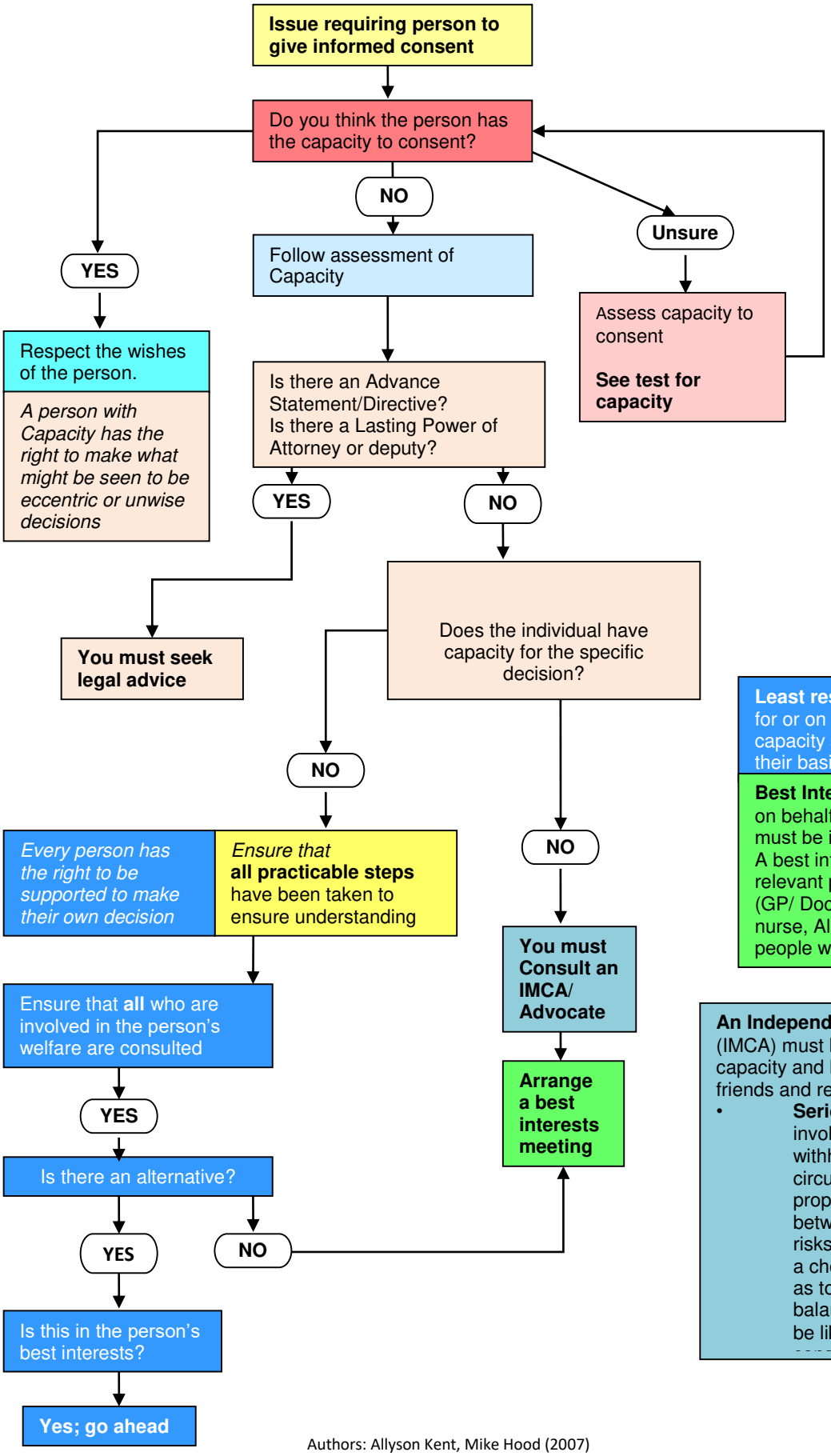
Record keeping; it is important that you accurately record and evidence any decisions made with regards to best interests

To access **Court of Protection** refer to Public Guardian

Authors: Allyson Kent/ Mike Hood (2007)

Appendix 2 - Mental Capacity Act (2005) Decision Making Pathway

All adults should be presumed to have capacity unless the opposite has been demonstrated. Consent must be obtained by the person undertaking the procedure and is specific to the decision to be made



Legal/Statutory requirements of the Mental Capacity Act (2005)

Test for Capacity:
- Understand the information given to them
- Retain the information long enough to make the decision
- Weigh up the information available to make the decision
- Communicate the decision

Valid Consent is:
- Given by a competent person
- Be given voluntarily
- Given following receipt of adequate information

All practicable steps:
- Consider use of real objects or photographs/hierarchy of symbolic development
- Arrange visits to treatment areas
- Develop information packages that are accessible
- Give the person extra time

Least restrictive option: Anything done for or on behalf of the person without capacity should be the least restrictive to their basic rights and freedoms

Best Interests: Anything done for and or on behalf of a person without capacity must be in the person's best interests
A best interests meeting should include all relevant parties include the person, medic (GP/ Doctor), advocate/IMCA, carers, nurse, Allied Health Professional and or people who know the person well

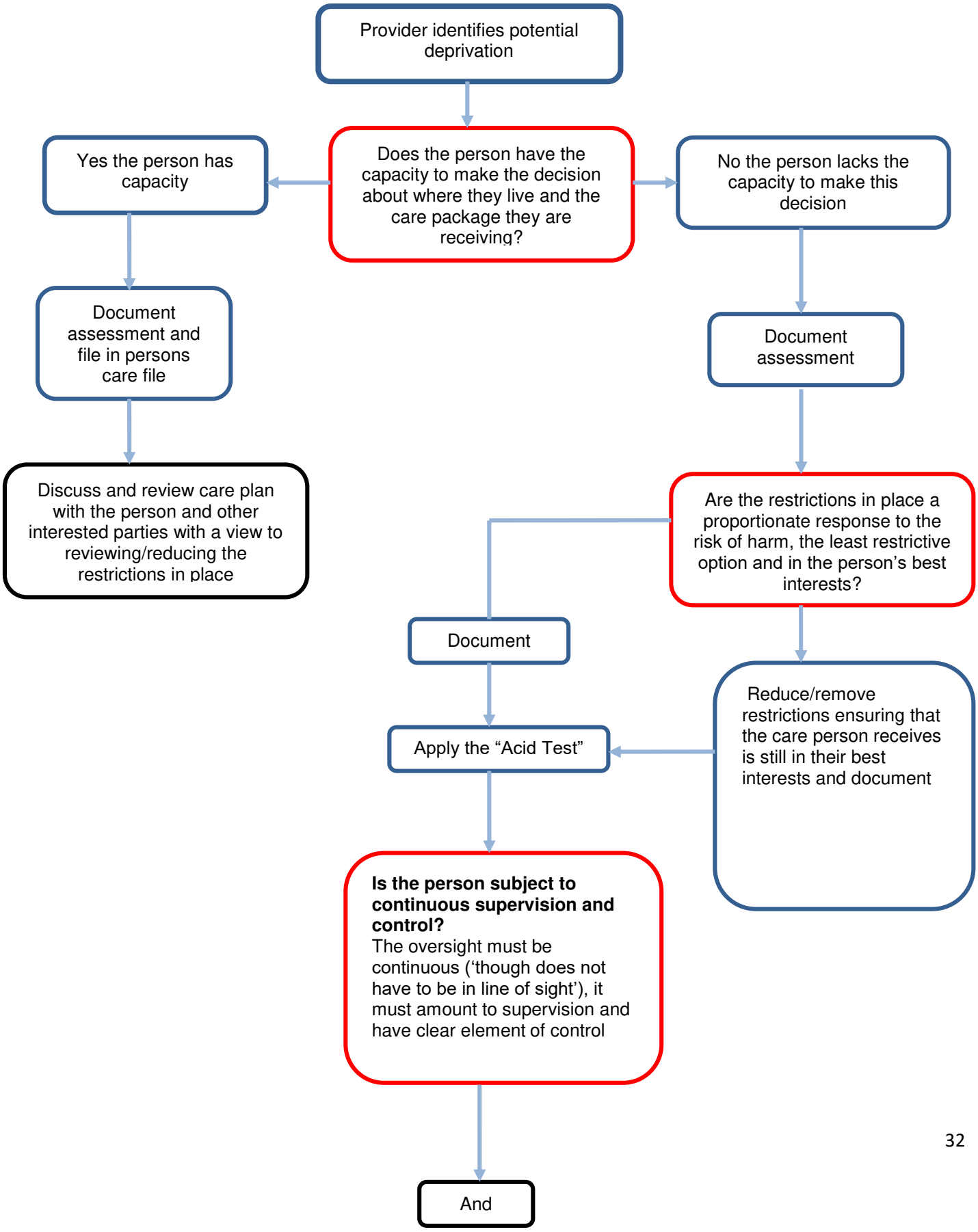
An Independent Mental Capacity Advocate (IMCA) must be involved if the person lacks capacity and has no relatives and or close friends and requires:

- **Serious medical treatment**; which involves providing, withdrawing or withholding treatment in specific circumstances where; In what is being proposed, there is a fine balance between the likely benefits and the risks to the person, **or** where there is a choice of treatments, and a decision as to which one to use is finely balanced **or** what is proposed would be likely to involve serious

Authors: Allyson Kent, Mike Hood (2007)

Appendix 3 - Deprivation of Liberty Flowchart

Provider flowchart for Domestic DoLs



Continued

Is the person free to leave?

The person may not be asking or showing to go or showing by their actions that they want to but the issue is about how staff would react if the person did try to leave or if relative's friends asked to remove them

Acid Test Met

Complete the Safeguarding Adults referral form and send the form along with the following;

- The Capacity Assessment
- The Best Interest Decision
- The Care Plan and Risk Assessments

Bristol https://www.bristol.gov.uk/en_US/social-care-health/deprivation-liberty-safeguards

NorthSomerset https://www.nsomerset.gov.uk/my-services/socialcare/health/mental-health/deprivation-of-liberty/

SouthGloucestershire https://www.gloucestershire.gov.uk/gsab/i-am-a-professional/deprivation-of-liberty-safeguards-dols/making-a-dols-application/

Acid Test not Met

Record your application of the Acid Test and file along with the capacity assessment and best interest decision in the persons care file

Monitor and review

Appendix 4 – Mental Capacity Act Assessment

Mental Capacity Assessment			
NAME:	**Date of Birth:**	**Residential Home/Supported Living:**	**Date:**
Mental Capacity			
Details of the decision to be made:			
1. IMPAIRMENT OF THE BODY OR MIND			
Does the resident have impairment of, or a disturbance in, the functioning of the mind or brain? (permanent or temporary)			
2. Mental Capacity Assessment			
The Mental Capacity Act (2005) says a resident is unable to make a particular decision if they cannot do one or more of the following four things:			
2a) Does the resident understand the information relevant to the decision?			
Explain and record the evidence:			

2b) Can the resident retain the information?
Record evidence:
2c) Can the resident weigh up or use the information as part of the process of making a decision?
Record the basis for the decision:
2d) Can the resident communicate the decision effectively?
Record how the decision was communicated (it can be written down or expressed in none verbal ways):

NAME:	**Date of Birth:**	**Residential Home/Supported Living:**	**Date :**
Outcome of the Mental Capacity Assessment			
On the balance of probabilities, there is a reasonable belief that the resident **has or lacks** capacity in relation to this decision (please delete as applicable)			

Name of Assessor: …… Date: ……

Signature of Assessor: …….. Time: ……..

Action Taken
Detail the action(s) taken and why it is believed it to be in the resident best interests (or whether a relevant advanced decision was made, or a deputy or attorney made the decision):
Detail any restrictions in the action taken and whether a deprivation of liberty application may (or may not) be required:
Signature: …… Print Name: …….. Job Title: …… Date: …….
The Mental Capacity Act 2005 (MCA) contains 5 principles: 1. Assume the service has capacity unless proven otherwise. 2. Do not treat the service user as incapable of making a decision unless all practicable steps have been taken to help them. 3. The service user should not be treated as incapable of making a decision because their decision may seem unwise. 4. Always do things, or take decisions for the service user without capacity, in their best interests. 5. Before making a decision on the service user's behalf, consider whether the outcome could be achieved in a less restrictive way. An assessment should be carried out if there are concerns that a service user does not have the capacity, to make a decision at this present time.

This form should be used to assist in the assessment of capacity; it should not detract from the use of professional expertise. If after assessment the service user's mental capacity is still questionable, please seek further professional advice.
For further information regarding mental capacity and the mental capacity act 2005 please refer to the 'Making Decision's booklets series 1-5. To order: 023 80 878 038 or 023 80 878 036
The booklets are also available online at www.dca.gov.uk/legal-policy/mental-capacity/publications.htm

Appendix 5 - Best Interest Template

Best Interests Decision(s) – On behalf of:

Best Interests Decision (See Mental Capacity Act 2005 – Code of Practice – Chapter Five)

NB The Mental Capacity Acts fourth principle is that any act ityyydone or decision made under the Act for a person who lacks capacity must be done or made in that person's best interests.

1. Consider whether the person is likely to regain capacity and whether the decision can be delayed.

2. Consider the views of the person who lacks capacity, including the past and present wishes and feelings, beliefs and values (in particular, any relevant written statement made when the person had capacity.

3. Consult other relevant people, where practical and appropriate, for their views about the person's best interests. Include details of persons consulted, their role (e.g. relative, carer, attorney – specify type) and consideration of the views expressed. Remember to follow relevant guidance about confidentiality. *NB A Lasting power of attorney allows the Attorney to make the decision on behalf of the person who lacks capacity*

4. Does this decision meet the criteria for an Independent Mental Capacity Advocate? If an IMCA is instructed, include details of the process and consultation.

5. Provide evidence of any valid Advance Decision applicable to the situation in question.

6. Consider options that may be less restrictive of the person's rights and freedoms.

7. **Best Interests Decision**. Provide evidence of how the decision was reached in the best interests of the person who lacks capacity and why the decision is preferable to any alternative courses of action.

Details of Decision-Maker(s)

Please sign when you have reviewed/agreed with the Best Interests Decision implemented and/or any changes made.

Decision Maker: Signature : Designation : Date : Time :		Decision Maker: Signature : Designation : Date : Time :		Decision Maker: Signature : Designation : Date : Time :	

Decision Maker: Signature : Designation : Date : Time :		Decision Maker: Signature : Designation : Date : Time :		Decision Maker: Signature : Designation : Date : Time :	

Appendix 6 - Mental Capacity Act and Deprivation of Liberty Safeguarding Training for CCG Staff

Level	Who	What	Learning Resource
Mental Capacity Act Foundation **Level 1**	Targeting all individuals who work with or may come into contact with people 16 years upwards.	Explain the 5 Principles of the MCA and how they use them when working with residents/patients • Describe what is meant by 'lack of capacity' and that capacity is decision and time specific • Identify what steps need to be taken to ensure that any decision taken is in a person's Best Interests • Define the reasons an IMCA may be appointed • Explain what provisions the MCA 2005 has put in place to enable people to make decisions now that have an impact later in their life	e-learning can be accessed through the MLE workbook videos
Mental Capacity Act Intermediate **Level 2**	Targeting all staff who have direct and regular contact with people aged 16 upwards including GP's and practice staff	As Level 1 • Understand their role as decision maker and what to do if they are not the decision maker • Describe how to undertake an assessment of an individual's capacity using the 2 stage assessment process • Explain how to ensure any decision that is made on behalf of a person who lacks capacity is in their Best Interests and how they consider the least restrictive option. • Demonstrate how to record a capacity assessment and best interest decision • Describe the roles of other individuals in decision making e.g. LPA's, Deputies, IMCA's • Explain what an Advance Decision is and what impact this has on an individual's care • Understand their role in End of Life care planning and what support an individual may need to make these decisions • Consent and DNACPR when applicable **Where applicable** Understand the concept of serious	Face to face training e-learning Videos Radio Broadcasts Webinars 'How to' guides Mobile Apps

		medical treatment.	

Level	Who	What	Learning Resource
Mental Capacity Act Expert **Level 3**	Targeting senior staff who have a lead responsibility in the organisation. Continuing Healthcare	• As Levels 1 & 2 • Describe 'What good looks like' in MCA assessment completion • Demonstrate the ability to coach/inform others to enhance their MCA practice and development • Understand the latest policy on MCA • Identify when a decision should be referred to the Court of Protection • Demonstrate how to complete Court of Protection documentation	Face to face training Webinars Briefings
Deprivation Liberty Safeguards Foundation **Level 1**	Targeting all individuals who work with people 16 years upwards	• Explain what is meant by the term restraint and identify different levels of restraint • Explain how a deprivation can be legally authorised • Describe their role in identifying and reporting when they believe an individual is being deprived of their liberty or restricted	Face to face training Webinars Briefings
Deprivation Liberty Safeguards Intermediate **Level 2**	Targeting all staff who have direct and regular contact with people aged 16 upwards (including GP's and practice staff)	• Describe the connection of DoLs with the ECHR (articles 5 & 8) • Demonstrate the process you should follow if you believe a deprivation is occurring Within a Care Home/Hospital Within a domestic setting • Explain the role of the BIA, MHA, IMCA, RPR within the DoLs process • Describe the process if someone leaves/moves/dies whilst subject to a DoLs Authorisation/Court of Protection order • Understand the process that should be followed when considering the restrictions in place before a person is placed into a care home/admitted into hospital, or when reviewing their care needs within a domestic setting	Face to face training e-learning Videos Radio Broadcasts Webinars 'How to' guides Mobile Apps
Deprivation Liberty Safeguards Expert **Level 3**	Targeting senior staff who have a lead responsibility in the organisation. Continuing Healthcare	• Understand the implications of current court judgements in relation to deprivation of liberty and how that impacts on their decision making	Face to face training Webinars Briefings

Useful Links and supporting information

Best interests decision-making www.bestinterests.org.uk
Confidential capacity assessment tool www.amcat.org.uk Confidential capacity assessment tool www.amcat.org.uk Court of Protection https://www.gov.uk/court-of-protection Court of Protection case reports www.bailii.org/ew/cases/EWHC/COP/ Court of Protection newsletters http://www.39essex.co.uk/resources/newsletters.php Court of Protection, Practice Direction 9E (Serious Medical Treatment) https://www.judiciary.gov.uk/wp-content/uploads/2015/06/copd-pd-9e-serious-medical-treatment.pdf Care Quality Commission (CQC) http://www.cqc.org.uk/ CQC DoLS report 2012/13 http://www.cqc.org.uk/public/reports-surveys-and-reviews/reports/deprivation-libertysafeguards- 2012/13 CQC – MCA DoLS guidance for providers http://www.cqc.org.uk/search/apachesolr_search/Mental%20Capacity%20Act CQC – MCA guidance for providers http://www.cqc.org.uk/sites/default/files/media/documents/rp_poc1b2b_100563_20111223_v4_00_ guidance_for_providers_mca_for_external_publication.pdf CQC MCA and DoLS pages http://www.cqc.org.uk and http://www.cqc.org.uk/search/apachesolr_search/Mental%20Capacity%20Act
Death of a person subject to an MCA DoLS authorisation http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/SocialCare/Deliveringsocialcare/ MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm Department of Health (DH) www.dh.gov.uk DH MCA archived pages (Some of the historical information regarding the MCA and DoLS have been placed in an archive by the Department of Health but the pages remain relevant) http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/SocialCare/Deliveringsocialcare/ MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm

European Convention on Human Rights http://www.hri.org/docs/ECHR50.html

European Court of Human Rights http://www.echr.coe.int

Health and Social Care Information Centre http://www.hscic.gov.uk/

Human Rights Act 1998 http://www.legislation.gov.uk/ukpga/1998/42/contents

IMCA Service – 5th Annual Report
https://www.gov.uk/government/publications/independent-mental-capacity-advocacy-service-fifthannual- report

Lasting Power of Attorney https://www.gov.uk/power-of-attorney/if-you-have-an-enduring-power-of-attorney

MCA 2005 www.legislation.gov.uk/ukpga/2005 and
http://www.legislation.gov.uk/ukpga/2005/9/contents

MCA 'Code of Practice'

http://www.tsoshop.co.uk/

www.publicguardian.gov.uk/mca/code-practice.htm

http://www.justice.gov.uk/protecting-the-vulnerable/mental-capacity-act

MCA DoLs "Code of Practice"

http://www.tsoshop.co.uk/

www.publicguardian.gov.uk/mca/code-practice.htm

http://www.justice.gov.uk/protecting-the-vulnerable/mental-capacity-act

MCA/Deprivation of Liberty Safeguards, Schedule A1, and associated regulations

http://webarchive.nationalarchives.gov.uk/20100407222006/http://www.dh.gov.uk/en/SocialCare/
Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/
DH_084948

http://webarchive.nationalarchives.gov.uk/20100402182610/http://www.dh.gov.uk/en/socialcare/
deliveringadultsocialcare/mentalcapacity/mentalcapacityactdeprivationoflibertysafeguards/index.htm

MCA DoLS standard forms (Alternatively forms can be obtained from local authority DoLS offices)

http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_089772

http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/socialcare/deliveringadultsocialcare/
mentalcapacity/mentalcapacityactdeprivationoflibertysafeguards/index.htm

MCA information booklets ('Making Decisions' series)
www.publicguardian.gov.uk/mca/additional-publicationsa-newsletters.htm

http://www.justice.gov.uk/protecting-the-vulnerable/mental-capacity-act

MCA 2007 – post-legislative assessment http://www.justice.gov.uk/protecting-the-vulnerable/mental-capacity-act

Mental Health Act and Code of Practice
http://www.tsoshop.co.uk/

http://www.legislation.gov.uk/ukpga/2007/12/contents

http://www.lbhf.gov.uk/Images/Code%20of%20practice%201983%20rev%202008%20dh_087073%5B1%5D_tcm21-145032.pdf
Mental Health Foundation MCA literature review
http://www.mentalhealth.org.uk/publications/mca-lit-review/

Mental Health Law Online www.mentalhealthlaw.co.uk

Ministry of Justice http://www.justice.gov.uk

National Institute for Health and Clinical Excellence (NICE) quality standard and guidance for patient experience in adult NHS services
http://www.nice.org.uk/guidance/qualitystandards/patientexperience/home.jsp

http://www.nice.org.uk/newsroom/pressreleases/PatientExperienceQSAndGuidance.jsp

National Institute for Health and Clinical Excellence (NICE) quality standard for service user experience in adult mental health
http://www.nice.org.uk/guidance/qualitystandards/service-user-experience-in-adult-mental-health/
index.jsp

NHS Commissioning Board: 'Commissioning for quality and innovation' guidance
http://www.commissioningboard.nhs.uk/files/2013/02/cquin-guidance.pdf

Office of the Public Guardian (OPG)www.publicguardian.gov.uk

Patient Experience Framework
This has been agreed by the National Quality Board and describes the aspects of a health care

experience which service users have said matter most to them. Clearly different people in different settings will have different priorities for what is important within this framework. http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/ DH_132786 Post-Legislative Assessment – Mental Health Act 2007 (also covers the amendments to Mental Capacity Act to include DoLS) http://www.official-documents.gov.uk/document/cm84/8408/8408.pdf
Social Care Institute for Excellence – MCA and DoLS resources www.scie.org.uk Social Care Institute for Excellence: DoLS Good Practice Guide http://www.scie.org.uk/publications/reports/report66.asp
'Transforming Patient Experience' A guide published in February 2013 by the NHS Institute http://www.institute.nhs.uk/patient_experience/guide/home_page.html
Universal Declaration of Human Rights (UDHR) www.un.org/en/documents/udhr/

Case Law

Supreme Court judgement – P v Cheshire
West and Chester Council and P & Q v Surrey County Council - Recent case law cases relating to the Deprivation of Liberty Safeguard
http://supremecourt.uk/decided-cases/docs/
UKSC_2012_0068_Judgment.pdf

KK v STCC [2012] EWHC2136 (COP)
This case underlines the importance of not pushing aside the presumption of capacity because a vulnerable person may not understand the complexity or peripheral detail of a decision. As long as they generally understand the decision expected of them that should suffice. Neither should the outcome of a best interests assessment be prejudged because of concerns about risks and safety. The case also focuses on the right to family life – on this occasion the bungalow that KK wished to return to.

Glossary

Acts in connection with care and treatment	Offers a statutory protection from liability where a person is performing an act in connection with the care and treatment of someone who lacks capacity assuming the decision is made within the framework provided by the Act.
Advance decisions	The MCA provides for patients a right to refuse treatment should they lose capacity in the future. It also provides for refusal of the end of life treatment but such instructions must be in writing.
Advocacy	The service provider's policy on advocacy highlights the role of independent mental capacity advocates (IMCAs) that staff know the circumstances in which a patient should have access to an IMCA and also know how to access the service and where responsibility for so doing lies. Data is collected on IMCA referral numbers and trends over time as part of ensuring all patients lawfully entitled to the support of an IMCA in respect of a serious medical treatment decision receive advocacy support.
Assessing capacity	Is a test for assessing whether a person lacks the capacity to take a particular decision at a particular time – the test is decision and time specific.
Best interests	Underlines the importance of best interests decision making and provides a non-exhaustive checklist of factors that decision-makers must work through when deciding what is in the best interests of a person assessed as lacking capacity.
Court Appointed Deputies	The MCA allows the Court of Protection to appoint deputies on behalf of people lacking the capacity to take decisions on welfare, healthcare and financial matters
Court of Protection	The MCA created this Court which has jurisdiction relating to the whole of the Act.
Future decision-making	The MCA allows a person, while they have the capacity, to plan ahead for a time when they may lack it through the appointment of a person(s) to take decisions in relation to property and affairs and/or health and welfare on their behalf.
General condition 5: hospitals are required to demonstrate they have staff with appropriate experience, skills and competencies.	How does this relate to knowledge of the MCA?

Independent Mental Capacity Advocates (IMCAs)	Patients who lack the capacity to take decisions in relation to serious medical treatment, and have nobody to speak on their behalf, have a legal entitlement to an advocate (IMCA) who will bring to the attention of the decision maker information regarding the patient's wishes, feelings, beliefs and values as well as other factors which may be relevant to the decision.
Less restrictive option	A person doing anything for or on behalf of a person who lacks capacity should consider options that are less restrictive of their basic rights and freedoms while meeting the identified need. CCGs will wish to place particular emphasis on being assured these principles are being applied to those in receipt of care on whose behalf treatment is being commissioned. In particular, they should seek evidence that compliance with them features in care plans, consent documents, training, audit and patient information etc.
Restraint	The MCA provides for the circumstances in which restraint can be used in relation to the care and treatment of somebody lacking capacity (in those circumstances where restriction and restraint may move towards deprivation of liberty the DoLs safeguards must be considered).
Rights and Freedoms	The rights to liberty and family life are reflected in care planning guidance as part of a process of ensuring patients are involved in and give informed consent to, care plans. These rights should be reflected in best interests decisions made on behalf of those lacking capacity.
Safeguarding Adults Standards for Commissioned Services	These safeguarding standards must be used in all contracts for all providers, regardless of whether the service works with children, young people, families or adults. These standards are informed by legislation and statutory guidance and evidenced from research
Service condition 1 all services will be **compliant with the law**	How does the hospital board assure itself that the hospital is compliant with the MCA? What information does it collect and what does it monitor?
Service conditions 9 Policies on consent	Does this policy address in detail how people who cannot consent will be identified, the role of the decision-maker, who is responsible for carrying out assessments of capacity and who is trained and expected to carry out best interests decisions? Is it clear what staff should do if uncertain about a patient's ability to make a specific decision and do they know how to use and apply the best interests decision making a checklist?

Service conditions 12: service user **Involvement.**	How does the hospital board assure itself that the experiences and views of those who lack capacity and their families are specifically recorded and acted on?
Service condition 13: equality of access and non-discrimination	How does the hospital board demonstrate that it meets its obligations under the Equality Act 2010? Can it show that people with dementia or learning disabilities (for example) are receiving the same quality of treatment and care as others?
Statutory principles of the MCA	1. Presume a person has capacity 2. Support individuals making decision by providing practical steps to help them 3. Individuals must retain the right to make their own decisions even if these may seem eccentric 4. Anything done for or on behalf of an individual without capacity must be in their best interests 5. Before doing something or making a decision on their behalf consider whether you could achieve their outcome in a less restrictive way
Unwise decisions	Just because an individual makes a decision others may consider to be unwise, they should not be treated as lacking capacity to make that decision.