Mental Capacity Act
& Deprivation of Liberty
Safeguards
Policy 2015-2017
# Mental Capacity Act & Deprivation of Liberty Safeguards Policy

<table>
<thead>
<tr>
<th>Policy ref no:</th>
<th>CCG 027/15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Author (inc job title)</td>
<td>Paulette Nuttall Designated Safeguarding Adults and MCA Lead Nurse</td>
</tr>
<tr>
<td>Date Approved</td>
<td>25th August 2015</td>
</tr>
<tr>
<td>Approved by</td>
<td>Bristol CCG Governing Body</td>
</tr>
<tr>
<td>Date of next review</td>
<td>2017</td>
</tr>
</tbody>
</table>
| How is policy to be disseminated | HOT Group  
Safeguarding Group  
Equality and Diversity |

### Check list for Governing Body/approving committee

<table>
<thead>
<tr>
<th>Item</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has an Equality Impact Assessment been completed?</td>
<td>yes</td>
</tr>
<tr>
<td>Has legal advice been sought?</td>
<td>No</td>
</tr>
<tr>
<td>Have training issues been addressed?</td>
<td>Yes</td>
</tr>
<tr>
<td>Are there financial issues and have they been addressed?</td>
<td>NO</td>
</tr>
<tr>
<td>How will implementation be monitored</td>
<td>Internal Audit</td>
</tr>
<tr>
<td>How will the policy be shared with:</td>
<td>CCG’s Website internal and external</td>
</tr>
<tr>
<td>• Staff?</td>
<td></td>
</tr>
<tr>
<td>• Patients?</td>
<td></td>
</tr>
<tr>
<td>• Public?</td>
<td></td>
</tr>
<tr>
<td>Are there linked policies and procedures?</td>
<td></td>
</tr>
<tr>
<td>• Safeguarding adults and Children’s policy</td>
<td></td>
</tr>
<tr>
<td>• Human Rights (HRA) 1998</td>
<td></td>
</tr>
<tr>
<td>• Mental Capacity Act (MCA) 2005</td>
<td></td>
</tr>
<tr>
<td>• Disability Discrimination Acts (DDA) 1995 and 2005</td>
<td></td>
</tr>
<tr>
<td>• Equality Act (EA) 2010</td>
<td></td>
</tr>
<tr>
<td>Name</td>
<td>Contact Numbers and emails</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>--------------------------------------------------</td>
</tr>
<tr>
<td>Bristol CCG</td>
<td>Tele: 0117 900 2280 Work Mobile: 07825231146 <a href="mailto:Paulette.nuttall@nhs.net">Paulette.nuttall@nhs.net</a></td>
</tr>
<tr>
<td>Bristol CCG</td>
<td>1 session per week at South Plaza on Thursdays C/o <a href="mailto:sarah.nicholson@bristolccg.nhs.uk">sarah.nicholson@bristolccg.nhs.uk</a></td>
</tr>
<tr>
<td>Bristol CCG</td>
<td>Tele: 0117 900 2385 Work Mobile: 07909004724 <a href="mailto:Rachelgriffiths1@nhs.net">Rachelgriffiths1@nhs.net</a></td>
</tr>
<tr>
<td>Bristol CCG</td>
<td>Tele: 0117 900 2263 Work Mobile: 07785925984 <a href="mailto:Jo.kapp@bristolccg.nhs.uk">Jo.kapp@bristolccg.nhs.uk</a></td>
</tr>
<tr>
<td>Bristol CCG</td>
<td>Tele: 0117 900 2284 <a href="mailto:Richard.Lyle@bristolccg.nhs.uk">Richard.Lyle@bristolccg.nhs.uk</a></td>
</tr>
<tr>
<td>Bristol Care Direct</td>
<td>Tele 0117 922 2700 Email : <a href="mailto:adult.care@bristol.gov.uk">adult.care@bristol.gov.uk</a> Fax: 0117 9036688 <a href="http://www.bristol.gov.uk/page/adult-care-and-health/report-suspected-abuse-safeguarding-adults-risk">http://www.bristol.gov.uk/page/adult-care-and-health/report-suspected-abuse-safeguarding-adults-risk</a></td>
</tr>
<tr>
<td>Bristol City Council</td>
<td>Tele 0117 903 1896 Email : <a href="mailto:adult.care@bristol.gov.uk">adult.care@bristol.gov.uk</a></td>
</tr>
<tr>
<td>Bristol City Council</td>
<td>Tele 0117 903 1540 Mobile 07584140678 Email : <a href="mailto:johnson.koikkara@bristol.gov.uk">johnson.koikkara@bristol.gov.uk</a></td>
</tr>
<tr>
<td>Police</td>
<td>Telephone 101 In an emergency telephone 999</td>
</tr>
<tr>
<td>Care Quality Commission</td>
<td>Tele: 03000 616161 Email <a href="http://www.cqc.org.uk">www.cqc.org.uk</a></td>
</tr>
</tbody>
</table>
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 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 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 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.

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 is 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  Clinical Commissioning Groups (CCGs)

Bristol CCG will need assurance that the Act is embedded in the work of organisations with their patients and will want to 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 the CCG 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 be put aside and in accordance with framework set down in the Act.

4 Duties and Responsibilities

4.1 Designated MCA Lead

CCGs are required to have a Designated MCA Lead who is responsible for providing support and guidance to clinicians in individual cases and supervision for staff in areas where these issues may be particularly prevalent and or complex.

The MCA Lead should also have a role in highlighting to which their own organisation, and the services they commission are compliant with the MCA through undertaking audit reporting to the governance structures and providing or securing the provision of training.

4.2 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.

5 Monitoring Compliance and Effectiveness

Recommendations of the types of evidence required to demonstrate compliance with the MCA can include:

- Copies of service providers’ MCA policies.
- Evidence that each hospital and other providers have an 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.

5.1 Training

Recommendation of the types of evidence required to demonstrate compliance with the MCA can include:

• Copy of the service provider’s training, induction and refresher training policy.

• 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 law’s 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 2015-16. Also, the CCG can request evidence of compliance though service conditions 9, 1, 12, 13 and General Condition 5.

6 Governance

• 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.

7 Deprivation of Liberty (DoLs) Safeguards

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.
7.1 **Acid Test**

UK Supreme Court Ruling on the test for whether a deprivation is occurring. This only applies to people who do not have capacity to consent to their own care and treatment:

1. is the person subject to continuous supervision and control?
2. Is the person free to leave?

If the answer is yes and the person is fully NHS funded by the CCG then an application to the Court of protection should be made.

7.2 **Deprivation of Liberty in domestic settings**

The Supreme Court held that a deprivation of liberty can occur in domestic settings where the State is responsible for imposing such arrangements. This includes a placement in a supported living arrangement in the community. Where there is, or is likely to be, a deprivation of liberty in such placements, it must be authorised by the Court of Protection.

The full judgments can be found on the Supreme Court’s website at the following link: [http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf](http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf)

8 **Equality Impact Assessment**

In progress.

9 **Guidance for General Practitioners and Practice Staff**

9.1 **Supporting the person in decision making**

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

- Does the patient have all the information they need to make the decision?
- Have they been given information on all 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.

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.

### 9.2 What happens in an emergency?

In 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.

### 9.3 When is a Capacity Assessment required?

The legal starting point is the presumption that an adult has mental capacity. 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 best interest. 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 risk of side effects, it is advised that a formal assessment is completed using the assessment of capacity form *(see appendix 1)*. If you choose not 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.
9.4 **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.

More complex decisions may require more formal assessments. A professional opinion on the person's capacity might be necessary. 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.

10 **Two stage test of Mental Capacity**

‘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’ (Mental Capacity Act 2005).

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. 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** – Does the patient have “an impairment or disturbance of the functioning of the mind or brain sufficient that the person lacks capacity to make that particular decision”?

The impairment or disturbance of the functioning of the mind or brain for example (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** – In order to establish the answer to the above question in stage one, 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.

• **Retain** the information (for long enough to process the information and make an effective decision).

• **Balance** or weigh 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. Health care staff must then ensure that they act in best interest.

10.1 Lack of capacity

Anybody who claims that an individual lacks capacity should be able to provide proof.

They need to be able to show, on the balance of probabilities, that the individual lacks 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 capacity to make the decision in question.

You need to ensure you evidence how you came to your conclusion ensuring that you have covered the CURB principles in section 10 of this policy. Please see section 11 of this policy regarding the implications of not thoroughly recording this.

10.2 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.
11 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 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 1, 2 and 4 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.

12 Best Interest

When a patient has been assessed a 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 ‘Best Interest’. When making a best interest 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.

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

12.1 **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 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. Decisions relating to patients social care needs may need to be made by a Social Worker, however a decision relating to a patient’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.

If a Lasting Power of Attorney (or Enduring 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. Enduring Powers of Attorney predate the MCA 2005 and will still carry legal status but were only applicable to financial decisions.

12.2 **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.
- Go to mediation.
- Seek legal advice via the Clinical Directorate
- An application could be made to the Court of Protection for a ruling
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 will only be involved 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

An IMCA may also be instructed 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;
- Obtain and evaluate information
- As far as possible, ascertain the person’s wishes and feelings, beliefs and values;
- Ascertain alternative courses of action
- Obtain a further medical opinion, if necessary; and
- Prepare a report for the person who instructed them.
- If an IMCA disagrees with the decision made, they can also challenge 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
Appendix 1 - Assessment of Capacity Template

Patient Name

Address

NHS Number

DOB

Any assessment of capacity is time and decision specific.

For practice guidance on how to assess capacity please consult the MCA Code of Practice

What has prompted this assessment: (include summary of relevant information)

What is the specific decision to be made:

Is there an impairment of or disturbance in the functioning of the persons mind or brain? (Specify what this is)

Is the impairment: (tick the most appropriate)

Temporary
Permanent
Fluctuating
Evidence for this:

Now use CURB to assess the following:

Can the person Communicate their decision: Yes/No
| Evidenced by: |  
|---|---|
| Can the person understand the information relating to the decision: Yes/No |  
| Evidenced by: |  
| Can the person retain the information long enough to make the decision: Yes/No |  
| Evidenced by: |  
| Can the person **balance** or weigh up the information to make the decision: Yes/No |  
| Evidenced by: |  
| If ‘No’ is indicated/evidenced in any of the 4 areas above this indicates that the person lacks capacity in relation to the specific decision. **You must now complete a Best Interest decision.** |  
| Were all reasonable steps taken to maximise the person’s capacity to make the decision? (document what action was taken e.g. consideration of time of day/location, use of interpreters, use of pictures etc.) |  
| Evidenced by: |  
| Is it appropriate to delay the decision if the person will regain capacity? (Tick most appropriate) |  
| Yes |  
| Not likely to regain capacity |  
| Not appropriate to delay |  
| Evidenced by: |  
| 10) Signature of decision maker: |  
| |  

---

19
Name:

Designation

Contact details

Date / Time.
Appendix 2 - Best Interest Template

Patient Name
Address
NHS Number
DOB

An act or decision made for or on behalf of a person who lacks capacity must be done, or made, in his/her best interests.

**Date of capacity assessment in relation to this decision:** (an assessment of capacity must be completed before a best interest decision is made)

**Outcome of the capacity assessment:** (please note best interest cannot be used for people who have capacity to make their own decisions)

1) What is the decision being considered?

2) Will the individual recover capacity if the assessment is delayed: (tick most appropriate)

   - Yes
   - Not likely to regain capacity
   - Not appropriate to delay

**Evidence:** (if the person will regain capacity state when this will be and defer decision making unless its no appropriate to delay)
3) **What are the views of the patient in relation to this decision** (document as present/past wishes/beliefs of the person, how you have involved the person)

4) **Views of interested others** (E.g. family, friends, carers, Lasting Power of Attorney, IMCA, Court of Protection Deputy, etc.)

   - Give names and roles below. If no-one justify why

5) **Is there a valid Lasting Power of Attorney or a Court of Protection Deputy**
   - Yes/ No

   - If yes name the individual

   - Has the decision maker verified the LPA  Yes/No

   - Date LPA registered:

6) **Is there a valid Advance Decision to Refuse treatment (ADRT)  Yes/No**

   - Details of this:

   - Is there an Advanced Care Plan or statement regarding this decision Yes/No

   - Details of this:

7) **What other professionals have been involved in the best interest decision:**
   - (this may include GP, Social Worker, Occupational Therapist, Physiotherapist etc)
| 8) **What are the options available:** (consider all available options and evidence why they are appropriate/inappropriate)  
You must always consider the least restrictive option. This does not mean you have to use the least restrictive option however you must be clear what evidence there is that this would not be appropriate. |
| 9) **Document what decision has been made in the persons Best Interests**  
**Is a review of this decision required?** (if so detail when this should take place) |
| 10) **Record any disputes in relation to the decision made:** (you may need to discuss any disputes with your line manager/ BCH legal services) |
| 11) **Name of the decision maker**  
Signed  
Designation  
Contact details  
Date / Time. |
Appendix 3 - 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

Test for Capacity has found the person lacks the capacity to consent therefore a best interests meeting must be arranged

Is it likely that the person may have capacity in the future?

YES

Can the decision or act wait until that time; consider if it is likely that the person will at some time have capacity to the matter in question.

YES

Delay the decision until that time
Can you identify when the person may have the capacity? Document and discuss with relevant others

NO

Does the decision involve serious medical treatment or a care home move

YES

Arrange the best interest meeting and invite all relevant parties

NO

NO

YES

Is there a relative /friend of individual nominated by the person to consult?

YES

Instruct an IMCA

NO

As decision maker follow the checklist opposite

Is there agreement that the proposal is in the persons best interests

NO

Is there a dispute?

YES

Evidence decision making using agreed decision record

NO

Proposed action, treatment goes ahead, with evidence via the Decision Record that the action is in the persons best interests

YES

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

Seek Court of Protection ruling

Authors: Allyson Kent/ Mike Hood (2007)
Appendix 4 - 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.

Issue requiring person to give informed consent

Do you think the person has the capacity to consent

Following assessment of Capacity – No; person does not have capacity

Assess capacity to consent

Unsure

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

Is there an Advance Statement/Directive? Is there a Lasting Power of Attorney or deputy?

See Test for Capacity

 Clarify what is Valid Consent

Is there an alternative?

Consider best interests

Yes; go ahead

Yes

Respect the wishes of the person.

A person with Capacity has the right to make what might be seen to be eccentric or unwise decisions

NO

Ensure that all practicable steps have been taken to ensure understanding

NO

Ensure that all who are involved in the person’s welfare are consulted

NO

Is there an alternative?

YES

Consider best interests

NO

Is this in the person’s best interests?

YES

Arrange a best interests meeting

NO

You must consult an IMCA

NO

You must seek legal advice

YES

Does the decision involve a serious medical treatment or The NHS arranges Hospital stay for 28 days or more or The arrangement of accommodation for 8 weeks or more

NO

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 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 consequences for the person
- Or the NHS arranges a hospital stay for 28 days or more
- Or the NHS or Local Authority arrange accommodation for 8 weeks or more
- Deprivation of Liberty Order
- Safeguarding Adults Procedures

Authors: Allyson Kent, Mike Hood (2007)
Appendix 5 - Deprivation of Liberty Flowchart

Provider flowchart for Domestic DoLs

Provider identifies potential deprivation

Yes the person has capacity

No the person lacks the capacity to make this decision

Document assessment

Does the person have the capacity to make the decision about where they live and the care package they are receiving?

Document assessment and file in persons care file

Yes the person has capacity

No the person lacks the capacity to make this decision

Discuss and review care plan with the person and other interested parties with a view to reviewing/reducing the restrictions in place

Are the restrictions in place a proportionate response to the risk of harm, the least restrictive option and in the person’s best interests?

Document

Apply the “Acid Test”

Is the person subject to continuous supervision and control?

The oversight must be continuous (‘though does not have to be in line of sight’), it must amount to supervision and have clear element of control

Reduce/remove restrictions ensuring that the care person receives is still in their best interests and document

And
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

To Care Direct by fax 0117 9036688 or email adultcare@bristol.gov.uk

**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.
<table>
<thead>
<tr>
<th>Level</th>
<th>Who</th>
<th>What</th>
<th>Learning Resource</th>
</tr>
</thead>
</table>
| Mental Capacity Act         | 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 work book videos                          |
| Foundation Level 1          |                                                                      |                                                                                                                                                                                                      |                                    |
| Mental Capacity Act         | 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 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 medical treatment. | Face to face training  
  e-learning  
  Videos  
  Radio Broadcasts  
  Webinars  
  ‘How to’ guides  
  Mobile Apps |
<p>| Intermediate Level 2        |                                                                      |                                                                                                                                                                                                      |                                    |</p>
<table>
<thead>
<tr>
<th>Level</th>
<th>Who</th>
<th>What</th>
<th>Learning Resource</th>
</tr>
</thead>
</table>
| 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

<table>
<thead>
<tr>
<th>Best interests decision-making</th>
<th><a href="http://www.bestinterests.org.uk">www.bestinterests.org.uk</a></th>
</tr>
</thead>
<tbody>
<tr>
<td>Confidential capacity assessment tool</td>
<td><a href="http://www.amcat.org.uk">www.amcat.org.uk</a></td>
</tr>
<tr>
<td>Confidential capacity assessment tool</td>
<td><a href="http://www.amcat.org.uk">www.amcat.org.uk</a></td>
</tr>
<tr>
<td>Court of Protection</td>
<td><a href="https://www.gov.uk/court-of-protection">https://www.gov.uk/court-of-protection</a></td>
</tr>
<tr>
<td>Court of Protection case reports</td>
<td><a href="http://www.bailii.org/ew/cases/EWHC/COP/">www.bailii.org/ew/cases/EWHC/COP/</a></td>
</tr>
<tr>
<td>Court of Protection newsletters</td>
<td><a href="http://www.39essex.co.uk/resources/newsletters.php">http://www.39essex.co.uk/resources/newsletters.php</a></td>
</tr>
<tr>
<td>Care Quality Commission (CQC)</td>
<td><a href="http://www.cqc.org.uk/">http://www.cqc.org.uk/</a></td>
</tr>
<tr>
<td>CQC – MCA DoLS guidance for providers</td>
<td><a href="http://www.cqc.org.uk/search/apachesolr_search/Mental%20Capacity%20Act">http://www.cqc.org.uk/search/apachesolr_search/Mental%20Capacity%20Act</a></td>
</tr>
<tr>
<td>CQC – MCA guidance for providers</td>
<td><a href="http://www.cqc.org.uk/sites/default/files/media/documents/rp_poc1b2b_100563_20111223_v4_00_guidance_for_providers_mca_for_external_publication.pdf">http://www.cqc.org.uk/sites/default/files/media/documents/rp_poc1b2b_100563_20111223_v4_00_guidance_for_providers_mca_for_external_publication.pdf</a></td>
</tr>
<tr>
<td>CQC MCA and DoLS pages</td>
<td><a href="http://www.cqc.org.uk">http://www.cqc.org.uk</a> and <a href="http://www.cqc.org.uk/search/apachesolr_search/Mental%20Capacity%20Act">http://www.cqc.org.uk/search/apachesolr_search/Mental%20Capacity%20Act</a></td>
</tr>
<tr>
<td>Department of Health (DH)</td>
<td><a href="http://www.dh.gov.uk">www.dh.gov.uk</a></td>
</tr>
<tr>
<td>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)</td>
<td><a href="http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/SocialCare/Deliveringsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm">http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/SocialCare/Deliveringsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm</a></td>
</tr>
<tr>
<td>European Court of Human Rights</td>
<td><a href="http://www.echr.coe.int">http://www.echr.coe.int</a></td>
</tr>
<tr>
<td>Health and Social Care Information Centre</td>
<td><a href="http://www.hscic.gov.uk/">http://www.hscic.gov.uk/</a></td>
</tr>
<tr>
<td>Topic</td>
<td>URL</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Lasting Power of Attorney</td>
<td><a href="https://www.gov.uk/power-of-attorney/if-you-have-an-enduring-power-of-attorney">https://www.gov.uk/power-of-attorney/if-you-have-an-enduring-power-of-attorney</a></td>
</tr>
<tr>
<td>MCA ‘Code of practice’</td>
<td><a href="http://www.tsoshop.co.uk/">http://www.tsoshop.co.uk/</a></td>
</tr>
<tr>
<td></td>
<td><a href="http://www.publicguardian.gov.uk/mca/code-practice.htm">www.publicguardian.gov.uk/mca/code-practice.htm</a></td>
</tr>
<tr>
<td>MCA DoLS “Code of Practice”</td>
<td><a href="http://www.tsoshop.co.uk/">http://www.tsoshop.co.uk/</a></td>
</tr>
<tr>
<td></td>
<td><a href="http://www.publicguardian.gov.uk/mca/code-practice.htm">www.publicguardian.gov.uk/mca/code-practice.htm</a></td>
</tr>
<tr>
<td>MCA information booklets (‘Making Decisions’ series)</td>
<td><a href="http://www.publicguardian.gov.uk/mca/additional-publicationsa-newsletters.htm">www.publicguardian.gov.uk/mca/additional-publicationsa-newsletters.htm</a></td>
</tr>
<tr>
<td>Mental Health Act and Code of Practice</td>
<td><a href="http://www.tsoshop.co.uk/">http://www.tsoshop.co.uk/</a></td>
</tr>
<tr>
<td>Mental Health Foundation MCA literature review</td>
<td><a href="http://www.mentalhealth.org.uk/publications/mca-lit-review/">http://www.mentalhealth.org.uk/publications/mca-lit-review/</a></td>
</tr>
<tr>
<td>Mental Health Law Online</td>
<td><a href="http://www.mentalhealthlaw.co.uk">www.mentalhealthlaw.co.uk</a></td>
</tr>
</tbody>
</table>
**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**

**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.

**Post Legislative Assessment – Mental Health Act 2007 (also covers the amendments to Mental Capacity Act to include DoLS)**

**Social Care Institute for Excellence – MCA and DoLS resources**
www.scie.org.uk

**Social Care Institute for Excellence: DoLS Good Practice Guide**

**‘Transforming Patient Experience’**
A guide published in February 2013 by the NHS Institute

**Universal Declaration of Human Rights (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

**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.
<table>
<thead>
<tr>
<th><strong>Glossary</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Acts in connection with care and treatment</strong></td>
</tr>
<tr>
<td><strong>Advance decisions</strong></td>
</tr>
<tr>
<td><strong>Advocacy</strong></td>
</tr>
<tr>
<td><strong>Assessing capacity</strong></td>
</tr>
<tr>
<td><strong>Best interests</strong></td>
</tr>
<tr>
<td><strong>Court Appointed Deputies</strong></td>
</tr>
<tr>
<td><strong>Court of Protection</strong></td>
</tr>
<tr>
<td><strong>Future decision making</strong></td>
</tr>
<tr>
<td><strong>General condition 5: hospitals are required to demonstrate they have staff with appropriate experience, skills and Competencies.</strong></td>
</tr>
</tbody>
</table>
### Glossary

| **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 checklist? |
## Glossary

<table>
<thead>
<tr>
<th>Service conditions 12: service user Involvement.</th>
<th>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?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Service condition 13: equality of access and non-discrimination</td>
<td>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?</td>
</tr>
</tbody>
</table>
| **Statutory principles of the MCA** | 1. Presume a person has capacity  
2. Support individuals making decision by providing practicable 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. |

Bristol CCG key contacts within the Community, Partnerships & PPI Directorate

Programme Director, Community, Partnerships & PPI Telephone: 0117 900 2284

Designated Safeguarding Adults and MCA Lead Nurse Tele: 0117 900 2280

Continuing Health Care Programme Manager 0117 900 2263