

<b>Corporate</b>	<b>CCG CO03 Mental Capacity Act 2005 (MCA) &amp; Deprivation of Liberty Safeguarding (DOLS) Policy</b>
------------------	--

Version Number	Date Issued	Review Date
V1.2	January 2022	01 July 2022 (or in line with establishment of Integrated Care Board)

<b>Prepared By:</b>	CCG Adult Safeguarding Lead, North of England Commissioning Support
<b>Consultation Process:</b>	Head of Governance Executive Committee
<b>Formally Approved:</b>	January 2022
<b>Approved By:</b>	Executive Committee
<b>Policy Adopted From:</b>	CO03 Mental Capacity Act 2005 (MCA) & Deprivation of Liberty Safeguarding (DOLS) Policy (1.1)

## Equality Impact Assessment

Date	Issues
November 2019	See Section 26

### POLICY VALIDITY STATEMENT

Policy users should ensure that they are consulting the currently valid version of the documentation. The policy will remain valid, including during its period of review. However, the policy must be reviewed at least once in every 3-year period.

### Accessible Information Standards

If you require this document in an alternative format, such as easy read, large text, braille or an alternative language please contact [tvccg.enquiries@nhs.net](mailto:tvccg.enquiries@nhs.net)

## Version Control

Version	Release Date	Author	Update comments
V1	April 2020	CCG Adult Safeguarding Lead,	New policy template
V1.1	January 2021	CCG Adult Safeguarding Lead	Extended until March 2020 in light of COVID19
V1.2	January 2022	CCG Adult Safeguarding Lead	Policy extended in light of ICB establishment

## Approval

Role	Name	Date
Approval	Combined Management Group	March 2020
Approval	Executive Committee	March 2021
Approval	Executive Committee	January 2022

# Contents

1. Introduction .....	4
2. Definitions.....	5
3. Mental Capacity Act Principles .....	6
4. Deprivation of Liberty Safeguards (DOLS).....	7
6. Governance and Accountability .....	9
7. Service Contract Standards .....	9
8. Implementation.....	9
9. Documentation .....	10
Appendix A.....	12
Appendix B.....	15
Appendix C .....	20
Appendix D .....	21
Equality Impact Assessment Screening.....	27
Equality Impact Assessment .....	31

# 1. Introduction

For the purposes of this policy NHS Tees Valley Clinical Commissioning Group will be referred to as “the CCG”.

This policy sets out how as a commissioning organisation the CCG will fulfil its duties and responsibilities effectively both within its own organisation and across the local health economy via its commissioning arrangements in relation to the Mental Capacity Act (MCA 2005). It also includes reference to the Deprivation of Liberty Safeguards (DoLS 2009), as commissioners must understand the implications of DoLS, and the CCG must be able to demonstrate understanding and compliance with this legislation within the organisation and seek assurance that any services commissioned are also compliant.

The CCG aspires to the highest standards of corporate behaviour and clinical competence, to ensure that safe, fair and equitable procedures are applied to all organisational transactions, including relationships with patients, their carers, public, staff, stakeholders and the use of public resources. In order to provide clear and consistent guidance, the CCG will develop documents to fulfil all statutory, organisational and best practice requirements and support the principles of equal opportunity for all.

The CCG, as a member of the local Safeguarding Adults Partnership/Safeguarding Board, has formally adopted the principles of the Multi Agency Safeguarding Adults Inter-Agency Policy and Procedures which references the Mental Capacity Act (MCA) 2005 and Deprivation of Liberty Safeguards (DoLS) 2009.

This policy should be read in conjunction with the

- The Mental Capacity Act: Code of Practice  
<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>
- Deprivation of Liberty Safeguards (DoLS): Code of Practice  
[http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_085476](http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476)

In 2015 the Law Commission carried out a 4 month consultation relating to the review of the Deprivation of Liberty Safeguards. The result of the consultation was the production of a new bill – The Liberty Protection Safeguards. This has been passed by parliament and received Royal Consent and is due for implementation in October 2020.

There will need to be a review of this policy when the details of the bill and supporting Code of Practice are known.

## 1.1. Status

This policy is a corporate policy.

## 1.2. Purpose and Scope

The purpose of this policy is to support the CCG in discharging its duties and responsibilities as a commissioner. This requires the CCG to understand and be able to apply the principles of the Mental Capacity Act (MCA) 2005 Code of Practice, and Deprivation of Liberty Safeguards (DoLS) Code of Practice 2009, so they can be assured that assessments of capacity are carried out appropriately and that decisions made on behalf of people who lack capacity are made in their best interests. Commissioned services are expected to demonstrate compliance with both Codes of Practice and any legal changes as a result of case law.

- 1.2.1. This policy applies to all staff employed by the CCG, including any agency, self-employed or temporary staff.
- 1.2.2. All managers must ensure their staff, are made aware of this policy and how to access it and ensure its implementation within their line of responsibility and accountability.

## 2. Definitions

- 2.1. The following terms and abbreviations are used within this document:

Reference	Abbreviated Term
Mental Capacity Act	MCA
Mental Health Act	MHA
Independent Mental Capacity Advocate	IMCA
Office of the Public Guardian	OPG
Court of Protection	COP
Lasting Power of Attorney	LPA
Enduring Power of Attorney	EPA
Advance Decision to refuse treatment	ADRT
General Practitioner	GP
Deprivation of Liberty Safeguards	DoLS
Supervisory Body	SB
Managing Authority	MA

## **2.2. Definition of Mental Capacity**

A person lacks capacity at a certain time if they are unable to make a decision for themselves in relation to a matter, because of impairment, or a disturbance in the functioning of the mind or brain.

An impairment or disturbance in the brain could be as a result of (not an exhaustive list):

- A stroke or brain injury
- A mental health problem
- Dementia
- A significant learning disability
- Confusion, drowsiness or unconsciousness because of an illness or treatment for it.
- A substance misuse

Lacking capacity is about a particular decision at a certain time (time and decision specific), not a range of decisions. If someone cannot make complex decisions it does not mean they cannot make simple decisions.

It does not matter if the impairment or disturbance is permanent or temporary but if the person is likely to regain capacity in time for the decision to be made, delay of the decision should be considered. Therefore Capacity Testing may be required at various periods.

Capacity cannot be established merely by reference to a person's age, appearance or condition or aspect of their behaviour, which might lead others to make an assumption about their capacity. An assumption that the person is making an unwise decision must be objective and related to the person's cultural values. Just because someone makes an unwise decision, does not mean that they lack capacity.

Lack of Capacity must be established following the processes outlined in Appendix C, and D.

## **3. Mental Capacity Act Principles**

**3.1.** The MCA provides legal protection from liability for carrying out certain actions in connection with care and treatment of people, provided that:

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

**3.2.** Provided you have complied with the MCA in assessing capacity and acting in the person's best interests you will be able to diagnose and treat patients who do not have the capacity to give their consent. For example (not an exhaustive list):

- Diagnostic examinations and tests
- Assessments
- Medical and dental treatment
- Surgical procedures
- Admission to hospital for assessment or treatment (except for people detained under the Mental Health Act 2007 (MHA))
- Nursing care
- Emergency procedures – in emergencies it will often be in a person's best interests for you to provide urgent treatment without delay.
- Placements in residential care

**3.3.** There are **five key principles** underpinning the MCA as follows:

1. A person must be assumed to have capacity unless it is proved otherwise.
2. A person is not to be treated as unable to make a decision unless all practicable steps have been tried to help them make the decision
3. A person should not be treated as incapable of making a decision just because that decision may seem unwise.
4. An act/decision made behalf of a person who lacks capacity, must, be in the person's best interests, not that of the person making the decision.
5. Before the act or decision, consider if it could be achieved in a less restrictive way.

**3.4. The Mental Capacity Act applies to all people over the age of 16**, with the exception of making a lasting power of attorney (LPA); making an advance decision to refuse treatment (ADRT) and making a will; in these situations, **a person must be aged 18 or over**.

The Act also introduces a number of bodies and regulations that staff must be aware of (see appendix B)

## **4. Deprivation of Liberty Safeguards (DOLS)**

**4.1.** Whilst Deprivation of Liberty Safeguards (DoLS) may occur in any care setting, the DoLS provide legal protection for vulnerable people over the age of 18, who are or may become, deprived of their liberty in a hospital or care home environment, whether placed under public or private arrangements. Those affected by the DoLS will include people with a "mental disorder", as defined within the Mental Health Act (1983) (2007), who lack the capacity to make informed decisions about arrangements for their care or treatment. The DoLS clarify that a person may be deprived of their liberty:

- If they lack the mental capacity to consent to their accommodation and care plans, and;
- It is in their own best interests to protect them from harm, and;
- It is a proportionate response to the likelihood and seriousness of the harm, and;
- It is the least restrictive way of meeting their needs safely.

On 1<sup>st</sup> April 2013, Primary Care Trusts ceased to exist and their Supervisory Body (SB) role was transferred to Local Authorities (LA). As such the CCG's are not Supervisory Bodies (SBs) and no longer have responsibility for authorisation of DoLS but they are required to work closely with providers and the LA's to ensure the protections offered by the safeguards are implemented appropriately.

On 19th March 2014, the Supreme Court published its' judgement in the P v Cheshire West and Chester Council and P & Q v Surrey County Council cases. This judgement significantly altered and clarified the definition of what constitutes a deprivation of liberty by establishing an 'Acid Test'.

For a person to qualify as being deprived of their liberty, they must;

- Lack the mental capacity to consent to the relevant care and support arrangements, where they have been put in place by the State.

And be:

- subject to continuous supervision and control
- **And** not free to leave.

In all cases the following are **NOT** relevant to the application of the test:

1. The person's compliance or lack of objection to the care arrangements.
2. The reason or purpose behind a particular placement; and
3. The relative normality of the placement (whatever the comparison made). This means that the person should not be compared with anyone else in determining whether there is a Deprivation of Liberty. However, young persons aged 16 or 17 should be compared to persons of a similar age and maturity without disabilities).

In introducing the 'Acid Test', it has reduced the threshold and widened the scope of whom may be affected, to cover Independent Living Schemes, Adult Placements, Children's Foster Placements and potentially even people at home receiving Continuing Health Care (CHC) funded packages of care.

Where a Deprivation of Liberty is identified, either the care plan must be significantly altered to remove restrictions and end the deprivation or authorisation is obtained via a prescribed legal process. Such authorisation should be obtained via the Mental Health Act 1983 (MHA), The Deprivation of Liberty Safeguards 2009 (DoLS) or via an application to the Court of Protection (COP). The CCG should be able to seek assurance from its commissioned services that they are compliant with the DoLS framework and COP requirements; through the Care Quality Review Group process. This includes the North East Commissioning Support Unit (NECS) who provide Continuing Health Care Services (CHC), as well as providers of NHS funded care.

The LA's as Supervisory Bodies have established MCA DoLS Policies and procedures which clearly outline expectations of NHS hospital providers and care homes, as Managing Authorities (MA) to apply for a DoLS.

**Any unauthorised deprivation will carry with it a potential risk of litigation.** If the CCG identifies via its commissioned services such a risk exists, this should be considered for inclusion on the appropriate risk register.

## **6. Governance and Accountability**

- 6.1 The CCG Governing Body is responsible for ensuring all its provider services have arrangements in place to meet their statutory requirements as well as service contract standards, and that these are being complied with. The governing body through its governance structures and Quality Performance arrangements will assure itself that its commissioned services are compliant and will receive regular reports and updates with reference to MCA and DoLS. See Appendix B
- 6.2 The CCG will ensure effective leadership, commissioning and governance through the following:
- Ensuring all commissioned services are fully aware of their local and statutory responsibilities regarding compliance with the Mental Capacity Act (MCA) and Deprivation of Liberty Safeguards (DoLS) and that the CCG commissioning, contracting, contract monitoring and quality assurance processes fully reflects this:
  - MCA and DoLS is an agenda item on the provider services' Clinical Quality Review Groups in accordance with the CQRG Forward Plan,
  - Ensuring service specifications, invitations to tender and service contracts fully reflect MCA and MCA DoLS requirements as outlined in this policy with specific reference to the clear standards for service delivery.
  - Ensuring a system is in place for escalating risks.

## **7. Service Contract Standards**

- 7.1 Clear local service quality standards for ensuring compliance with the Mental Capacity Act (MCA) and Deprivation of Liberty Safeguards (DoLS) will be included in all commissioning arrangements, as appropriate to the service.
- 7.2 The CCG will seek assurance from providers in relation to these standards via its contract management and quality assurance processes.

## **8. Implementation**

- 8.1 This policy will be available to all Staff within the CCG via the shared intranet and the internet sites.
- 8.2 All Executive leads and Managers are responsible for ensuring that relevant staff within their own directorates and departments have read and understood this document and are competent to carry out their duties.

### 8.3 The training required for CCG staff to comply with this policy is:

- Mandatory Safeguarding Adults,
- MCA, including MCA DoLS training programme

In line with their role and responsibilities as outlined in the Adult Safeguarding: Roles and Competencies for Health Care Staff (August 2018)

<https://www.rcn.org.uk/professional-development/publications/pub-007069>

## 9. Documentation

### 9.1 Other related policy documents

Safeguarding Adults Policy

### 9.2 Legislation and statutory requirements

- Cabinet Office (1998) *Human Rights Act 1998*. London. HMSO.
- Cabinet Office (2000) *Freedom of Information Act 2000*. London. HMSO.
- Cabinet Office (2005) *Mental Capacity Act 2005*. London. HMSO
- Cabinet Office (2006) *Equality Act 2006*. London. HMSO.
- Cabinet Office (2007) *Mental Health Act 2007*. London. HMSO.
- Health and Safety Executive (1974) *Health and Safety at Work etc. Act 1974*. London. HMSO.
- Cabinet Office (1983) *Mental Health Act 1983*. London. HMSO
- Cabinet Office (2005) *Mental Capacity Act 2005*. London. HMSO.
- Cabinet Office (2007) *Mental Health Act 2007*. London. HMSO
- Department of Health (2007) *Mental Capacity Act 2005: Deprivation of liberty safeguards - Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice*. London. DH.
- Department of Health (2009) *The Mental Capacity Act Deprivation of Liberty Safeguards*. London. DH.
- Griffiths, Rachel and Leighton, John (November 2012) Adults' Service SCIE Report 62. Managing the transfer of responsibilities under the Deprivation of Liberty Safeguards: a resource for local authorities and healthcare Commissioners. London: Social Care Institute for Excellence.
- Health and Safety Executive (1974) *Health and Safety at Work etc. Act 1974*. London. HMSO.
- House of Lords (March 2014) Select Committee on the Mental Capacity Act 2005: Post-legislative scrutiny. London: The Stationery Office
- P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents) P and Q (by their litigation friend, the Official Solicitor) (appellants) v Surrey County Council (Respondents) [2014] UKSC 19 on appeal from: [2011] EWCA Civ 1257; [2011] EWCA Civ 190

### 9.3 Best practice recommendations

- Department of Health. (2006) *Records Management: NHS Code of Practice*. London: DH.
- Independent Safeguarding Authority (<http://www.isa.gov.org.uk/>)

## **10. Monitoring, Review and Archiving**

### **10.1 Monitoring**

The CCG governing body will agree a method for monitoring the dissemination and implementation of this policy. Monitoring information will be recorded in the policy database.

### **10.2 Review**

10.2.1 The CCG governing body will ensure that this policy document is reviewed in accordance with the timescale specified at the time of approval. No policy or procedure will remain operational for a period exceeding three years without a review taking place.

10.2.2 Staff, who becomes aware of any change which may affect a policy should advise their line manager as soon as possible. The governing body will then consider the need to review the policy or procedure outside of the agreed timescale for revision.

10.2.3 For ease of reference for reviewers or approval bodies, changes should be noted in the 'document history' table on the front page of this document.

**NB:** If the review consists of a change to an appendix or procedure document, approval may be given by the sponsor director and a revised document may be issued. Review to the main body of the policy must always follow the original approval process.

### **10.2 Archiving**

The governing body will ensure that archived copies of superseded policy documents are retained in accordance with Records Management: Code of Practice for Health and Social Care 2016.

## Duties and Responsibilities

<b>Council of Members / members Assembly</b>	The council of members / members assembly has delegated responsibility to the Governing Body (GB) for setting the strategic context in which organisational process documents are developed, and for establishing a scheme of governance for the formal review and approval of such documents.
<b>Chief Officer / Chief Operating Officer</b>	<p>The Chief Officer / Chief Operating Officer as the Accountable Officer has overall responsibility for the strategic direction and operational management, including ensuring that process documents comply with all legal, statutory and good practice requirements.</p> <p>The Chief Officer / Chief Operating Officer is accountable for ensuring that the health contribution to MCA and MCA DoLS is discharged effectively across the whole local health economy through CCG commissioning arrangements.</p> <p>This role is supported by the Director of Nursing and Quality who holds delegated responsibility and is the executive lead for Safeguarding Adults. The Designated Nurse/Head of Quality and Safeguarding provide expert advice to the Governing Body on MCA and MCA DoLS matters.</p>
<b>Policy Author</b>	<p>The Safeguarding Adult Lead:</p> <ul style="list-style-type: none"> <li>• generating and formulating this policy document</li> <li>• identifying the need for any change to the document as a result of becoming aware of changes in practice, changes to statutory requirements, revised professional standards and local/national directives</li> <li>• establishing mechanisms for regular the monitoring of compliance</li> <li>• notifying the Director of Nursing and Quality should any revision to this document be required.</li> </ul>
<b>Executive Lead for safeguarding adults</b>	<p>The CCG Director of Nursing and Quality, as executive lead for safeguarding adults, MCA and MCA DoLS will ensure the CCG has effective professional appointments, systems, processes and structures in place, ensuring that there is a programme of training and mentoring to support the Designated Nurse for Safeguarding Adults/Head of Quality and Safeguarding for MCA, MCA DoLS.</p> <p>The Director of Nursing and Quality is the Sponsoring Director for this policy and is responsible for ensuring that:</p> <ul style="list-style-type: none"> <li>• this policy is drafted, approved and disseminated in accordance with the Policy for the Development and Approval of Policies (Corporate Policy CO.001, version 5).</li> </ul>

	<ul style="list-style-type: none"> <li>• the necessary training required to implement this document is identified and resourced.</li> <li>• mechanisms are in place for the regular evaluation of the implementation and effectiveness of this document.</li> <li>• The CCG has in place assurance processes to ensure compliance with MCA, MCA DoLS legislation, guidance, policy, procedures, code of practice, quality standards, and contract monitoring of providers</li> </ul>
<b>Designated Professionals</b>	<p><b>The Designated Nurses for Safeguarding Adults/ Head of Quality and Safeguarding</b> will take a strategic and professional lead on all aspects of the NHS contribution to MCA and MCA DoLS across the CCG area, which includes all commissioned providers. They will:</p> <ul style="list-style-type: none"> <li>• work with the Director of Nursing and Quality to ensure robust assurance arrangements are in place within the CCG and provider services</li> <li>• provide advice and expertise to the CCG's governing body and to the Local Safeguarding Partnerships and to professionals across both the NHS and partner agencies</li> <li>• provide professional leadership, advice, support and professional supervision to the lead adult safeguarding professionals in each provider organisations</li> <li>• represent the CCG on relevant committees, networks and multi agency groups charged with responsibility for leadership, oversight and implementation of MCA, MCA DoLS</li> <li>• lead and support the development of MCA, MCA DoLS policy and procedures in the CCG in accordance with national, regional and local requirements.</li> <li>• Provide advice and guidance in relation to MCA, MCA DoLS training including standards</li> <li>• Ensure quality standards for MCA, MCA DoLS are developed and included in all provider contracts and that compliance is evidenced.</li> </ul>
<b>Named GP</b>	<p>The Named GP will lead and support the development of practice within Primary Care (GPs) which includes training standards and compliance with statutory guidance.</p>
<b>Managers and Executive Leads</b>	<p>Executive leads and Managers have responsibility for:</p> <ul style="list-style-type: none"> <li>• ensuring they are aware of and are able to carry out their responsibilities in relation to MCA, MCA DoLS</li> <li>• ensure that the MCA, MCA DoLS policy is implemented in their area of practice</li> <li>• ensuring staff are aware of the contact details of the Designated Nurses for Safeguarding Adults/Head of Quality and Safeguarding and the local authority contact number for MCA, MCA DoLS</li> <li>• ensuring that all staff undertake mandatory MCA, MCA DoLS training at the appropriate level for their role</li> <li>•</li> </ul>

<b>CCG Staff</b>	<p>All staff, including temporary and agency staff are responsible for:</p> <ul style="list-style-type: none"> <li>• compliance with the MCA, MCA DoLS Policy</li> <li>• ensuring they familiarise themselves with their role and responsibility in respect of MCA, MCA DoLS policy</li> <li>• identifying training needs in respect of these procedures and guidance and informing their line manager</li> <li>• complete mandatory MCA, MCA DoLS training in accordance with the CCG Safeguarding Adults and MCA, MCA DoLS training plan.</li> <li>• Where the CCG employee in performing their duties feels and deprivation of liberty is taking place but the managing authority (hospital, care home, hospice, supported living/domestic setting) are not acting on concerns that a person meets the criteria for DoLS authorisation they should contact the supervisory body and make a third party application.</li> <li>• Where a CCG employee recognises a potential deprivation of liberty is occurring in domestic setting, such as independent living, adult foster placement, or in a persons own home. The care package should be reviewed to identify if restrictions could be removed and therefore negate a deprivation of liberty, otherwise if the acid test applies and care is provided by the state the advice should be sought from the CCG legal advisor as to whether an application to the Court of Protection for authorisation is necessary</li> </ul>
<b>CSU Staff</b>	<p>Whilst working on behalf of the CCG, CSU staff will be expected to comply with all policies, procedures and expected standards of behaviour within the CCG, however they will continue to be governed by all policies and procedures of their employing organisation.</p>

## Regulations

### 1. Regulations staff must be aware of;

- The Independent Mental Capacity Advocate (section a)
- The Office of the Public Guardian (section b)
- The Court of Protection (section c)
- Advance Decisions to refuse treatment (section d)
- Lasting Powers of Attorneys (section e)

### 2. The Independent Mental Capacity Advocate (IMCA)

#### 2.1.1 Advocacy is taking action to help people:

- Express their views
- Secure their rights
- have their interests represented
- access information and services
- explore choices and options

#### 2.1.2 Advocacy promotes equality, social justice and social inclusion. Therefore an IMCA is not a decision maker for a person who lacks capacity but to support the person who lacks capacity and represent their views and interests to the decision maker.

#### 2.1.3 Referrals to an IMCA must be considered when:

- There needs to be a decision relating to serious medical treatment.
- Changes in long-term care (more than 28 days in a hospital or 8 weeks in a care home)
- A long-term move to different accommodation is being considered for a period of over 8 weeks.
- Care Reviews take place – if the IMCA would provide a particular benefit e.g. continuous care reviews about accommodation or changes to accommodation.
- Adult protection cases take place even if befriended.

#### 2.1.4 If a decision is to be made in relation to any of the above statutory areas (apart from emergency situations) an IMCA **MUST** be instructed **PRIOR** to the decision being made. If it is urgent then the decision can be taken without an IMCA but they must be instructed afterwards.

#### 2.1.5 If, after consultation with your line manager, you consider appointment of an IMCA would be of particular benefit to an individual then a referral must be made as outlined within appendix B

#### 2.1.6 It is important to remember that an IMCA is not a decision maker for a person who lacks capacity but to support the person who lacks capacity and represent their views and interests to the decision maker.

- 2.1.7 The IMCA will prepare a report for the person who instructed them and if they disagree with the decision made they can also challenge the decision maker.

### **3 The Office of the Public Guardian (OPG)**

- 3.1.1 This exists to help protect people who lack capacity by setting up a register of Lasting Powers of Attorney; Court appointed Deputies; receiving reports from Attorneys acting under LPAs and from Deputies; and providing reports to the COP, as requested.
- 3.1.2 The OPG can be contacted to carry out a search on three registers which they maintain, these being registered LPAs, registered EPAs and the register of Court orders appointing Deputies. Application to search the registers is a fixed cost.
- 3.1.3 Further information regarding the Office of the Public Guardian can be found by the following link:  
<http://www.publicguardian.gov.uk/>

### **4 The Court of Protection (COP)**

- 4.1.1 This is a specialist court for all issues relating to people who lack capacity to make specific decisions. The Court makes decisions and appoints Deputies to make decisions in the best interests of those who lack capacity to do so.
- 4.1.2 The Act provides for a COP to make decisions in relation to the property and affairs and healthcare and personal welfare of adults (and children in a few cases) that lack capacity. The Court also has the power to make declarations about whether someone has the capacity to make a particular decision. The Court has the same powers, rights, privileges and authority in relation to mental capacity matters as the High Court. It is a superior court of record and is able to set precedents (i.e. set examples to follow in future cases).
- 4.1.3 The Court of Protection has the powers to:
- decide whether a person has capacity to make a particular decision for themselves; make declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make such decisions;
  - appoint deputies to make decisions for people lacking capacity to make those decisions;
  - decide whether an LPA or EPA is valid; and remove deputies or attorneys who fail to carry out their duties, and hear cases concerning objections to register an LPA or EPA and make decisions about whether or not an LPA or EPA is valid.
- 4.1.4 Details of the fees charged by the court, and the circumstances in which the fees may be waived or remitted, are available from the Office of the Public Guardian.  
<http://www.publicguardian.gov.uk/>
- 4.1.5 Further information regarding the Court of Protection can be accessed via the Office of the Public Guardian website and the following link:  
<http://www.hmcourts-service.gov.uk/HMCSCourtFinder/>

4.1.6 It must be stressed that any reference to the Court of Protection must be discussed with the Equality & Human Rights service in the first instance. The CCG must ensure that all informal and formal internal mechanisms be exhausted before making any application to the Court of Protection. This is outlined in Appendix B.

## **5 Advance Decisions to Refuse Treatment (ADRT)**

5.1.1 People may have given advance decisions regarding health treatments, which will relate mainly to medical decisions, these should be recorded in the persons file where there is knowledge of them. These may well be lodged with the person's GP and are legally binding if made in accordance with the Act.

5.1.2 Making an advance decision to refuse treatment over the age of 18 years allows particular types of treatment you would never want, to be honoured in the event of losing capacity – this is legally binding and doctors etc. must follow directions.

5.1.3 You must take all reasonable efforts to be aware of the advance decision and that it exists, is valid and applicable to the particular treatment in question.

5.1.4 The Act introduces a number of rules you must follow. Therefore a person should check that their current advance decision meets the rules if it is to take effect.

5.1.5 An advance decision need not be in writing although it is more helpful. For life sustaining treatment (treatment needed to keep a person alive and without it they may die) this must be in writing.

5.1.6 Life sustaining advance decisions must:

- Be in writing
- Contain a specific statement, which says your decision applies even though your life may be at risk.
- Signed by the person or nominated appointee and in front of a witness
- Signed by the witness in front of the person

This does not change the law on euthanasia or assisted suicide. You cannot ask for an advance decision to end your life or request treatment in future.

5.1.7 To establish whether an advance decision is valid and applicable the healthcare professional must try to find out if the person;

- Has done anything that clearly goes against their advance decision.
- Has changed their mind and withdrawn their decision
- Has subsequently conferred the power to make that decision on an attorney, or
- Would have changed their decision if they had known more about the current circumstances.

## 6 Lasting Powers of Attorney (LPA)

6.1.1 This is where a person with capacity appoints another person to act for them in the eventuality that they lose capacity at some point in the future. This has far reaching effects for healthcare workers because the MCA extends the way people using services can plan ahead for a time when they lack capacity. These are Lasting Powers of Attorney (LPAs), advance decisions to refuse treatment and written statement of wishes and feelings. LPAs can be friends, relatives or a professional for:

- Property and affairs LPA re financial and property matters
- Personal Welfare LPA re decisions about health and welfare, where you live day to day care or medical treatment.

6.1.2 This must be recorded in the person's file where there is knowledge of it. An LPA can only act within the remit of their authority.

### 6.2 Important facts about LPAs

- Enduring Powers of Attorney (EPAs) will continue whether registered or not.
- When a person makes an LPA they must have the capacity to understand the importance of the document.
- Before an LPA can be used it must be registered with the Office of the Public Guardian.
- An LPA for property and affairs can be used when the person still has capacity unless the person (donor) specifies otherwise.
- A personal welfare attorney will have no power to consent to, or refuse treatment whilst a person has the capacity to decide for themselves.
- If a person is in your care and has an LPA, the attorney will be the decision maker on all matters relating to a person's care and treatment.
- If the decision is about life sustaining treatment the attorney will only have the authority to make the decision if the LPA specifies this.
- If you are directly involved in care or treatment of a person you should not agree to act as an attorney.
- It is important to read the LPA to understand the extent of the attorney's power.

## 7 Clinical Interventions

### 7.1 Decisions that are not covered by the MCA:

- Making a will
- Making a gift
- Entering into a contract
- Entering into litigation
- Entering in to marriage
- Sexual Relationships

- 7.1.1 There must always be an assumption of capacity; however procedural guidance at Appendix B tells a practitioner what to do if it is suspected that a vulnerable person lacks capacity to make a decision. This is called a **Functional Capacity Test**.
- 7.1.2 It is recognised that a number of different professionals are involved with persons who may lack capacity and in certain circumstances may be required to make decisions on their behalf.
- 7.1.3 The extent to which expert input is required, and the degree to which detailed recording is necessary, depends on the nature of the decisions being made. Some decisions will be day to day, such as what to wear, and other decisions may have more lasting or serious consequences such as a change of accommodation.
- 7.1.4 It is important to show that in assessing capacity you,
- Have enabled a person, so far as is possible, to make their own decisions,
  - Have followed the five key principles which must inform everything you do when providing care or treatment for a person who lacks capacity,
  - Have taken reasonable steps to establish lack of capacity,
  - Have reasonable belief that the person lacks capacity and have recorded the reasons why you believe this.
  - Have demonstrated their action will be in the person's best interest.
  - Section 5 of the Act offers statutory protection from liability where a person is performing an act in connection with the care or treatment of someone who lacks capacity, provided they have followed due process.

**Procedural Intervention****1. Introduction**

- 1.1** When a person is in your care and needs to make a decision you must assume that person has capacity and make every effort to support and encourage the person to make the decision themselves. Also remember that people can make unwise or eccentric decisions, but this does not mean they lack capacity.
- 1.2** This could include:
- Does the person have all relevant information?
  - Could the information be explain or shown more easily?
  - Are there particular times of the day when a person's understanding is better?
  - Can anyone else help to support the person?
- 1.3** Every effort must be made to encourage and support a person to make a decision for themselves. If this is difficult, an Independent Mental Capacity Advocate (IMCA) is a new service offering a specific type of advocate that will only be involved if there is no-one else appropriate and in specific situations such as:
- Decision about serious medical treatment
  - Decisions about moving into long term care – 8 weeks +
  - The IMCA will obtain and evaluate relevant information
  - Discuss the proposed decision with professionals and others concerned
  - Find out as far as possible their wishes and feelings
  - Consider making alternative courses of action
  - Get further medical opinion where necessary
  - Provide a report with submissions for the person making the decision
- 1.4** When there is reason to believe a person does lack capacity at this time consider:
- Has everything been done to help and support the person?
  - Does the decision need to be made without delay?
  - Is it possible to wait until the person has the capacity to decide?
- 1.5** If the person's ability to make a decision still seems questionable then you will need to assess and record capacity.

## Two Stage Capacity Test

### Stage 1

**Does the person have an impairment of, or a disturbance in the functioning of their mind or brain?**

Examples may include the following:

- Dementia
- Significant learning disability,
- Brain damage,
- Delirium,
- Concussion,
- Symptoms of drug or alcohol use.
- Physical or medical conditions that cause confusion, drowsiness or loss of consciousness.

**If no impairment is present then the person cannot lack capacity under The Act.**

### Stage 2

**Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?**

Stage 2 can only apply when all practical and appropriate support to help the person make the decision has failed.

**A person is unable to make a decision if they cannot:**

1. Understand information about the decision to be made (the Act calls this relevant information).
2. Retain that information in their mind (long enough to make an effective decision)
3. Use or weigh that information as part of the decision making process, or
4. Communicate their decision (by talking, using sign language or any other means)

## 1. Decision Making

- 1.1** The person responsible for undertaking the capacity test is the **Decision Maker**. The person who assesses a person's capacity to make a decision will usually be the person who is directly concerned with that person at the time the decision needs to be made. It should be the most appropriate person in relation to the type of decision involved. This means that different people will be involved in assessing a person's capacity at different times and for the CCG they will be a **qualified professional** as follows:

- Qualified Nurses
- Physiotherapists
- Occupational Therapists
- Other Allied Health Professionals
- GPs

**1.2** However, if a person has a Lasting Power of Attorney or Court Deputy then that person would act as the decision maker within the remit of their legal powers. For example finance and property or health and welfare or both if stated.

**1.3** It is important to consider the following:

- What is the Decision that needs to be made?
- Who will be involved generally?
- Who needs to be consulted?
- Who is the decision maker?
- How should the decision be made?

**1.4** You should consider the following prompts prior to decision making:

- The environment is appropriate where it is quiet and uninterrupted.
- The person has the relevant information and in a format that they can understand? Do not burden the person with more detail than necessary.
- Could it be explained in an easier way and do you need help from other people for example a Speech and Language Therapist or an Interpreter to help with any issue of communication?
- Is this the right moment or place to discuss this, does the person seem comfortable discussing this issue now?
- Can anyone else assist? Consult with family and other people who know the person well.
- Does the decision have to be made now? Try to choose the best time for the person and ensure that the effects of any medication or treatment are considered.
- Can this wait until the person has capacity if the loss is temporary?
- Be aware of cultural factors, which may have a bearing on the individual. Consider whether an advocate is required.
- Take it easy. Make one decision at a time.

**1.5** You must always follow the five key principles of the MCA in any decision-making and assess at a person's best level of functioning for the decision to be taken.

**1.6** The MCA states that "assessment of capacity to take day to day decisions or consent to care, require no formal assessment procedures". However although day-to-day assessments of capacity may be informal, they should still be written down by staff. Therefore if an employee's decision is challenged, they must be able to describe why they had a reasonable belief of a lack of capacity. Therefore recording should always be inserted within a patient's case notes or care plan.

- 1.7** In relation to more complex decisions involving perhaps a life changing decision it is essential that there is evidence of a formal, clear and recorded process. In order to achieve this Record of Capacity Test and Best Interests Assessment form (MCA 1) must be completed – attached at ANNEX A.

## **2. Functional Capacity Test**

- 1.1** When should capacity be assessed? This must be decision specific which means that:
- The assessment of capacity must be about a particular decision at a particular time – not a range of decisions
  - If someone cannot make a complex decision, don't assume they cannot make a simple decision
  - You cannot decide someone lacks capacity based on his or her appearance, age, condition or behaviour alone.
- 2.2** In order to decide a person has the mental capacity to make a decision you must decide whether there is an impairment or disturbance in the functioning of the person's brain – it does not matter if this is permanent or temporary.
- 2.3** If so the second question is does the impairment/disturbance make the person unable to make that particular decision? The person will be unable to make a particular decision after all appropriate help and support to make the decision has been given to them they cannot:
- Understand the information relevant to the decision including the likely consequences of making or not making the decision.
  - Retain the information
  - Use the information as part of the decision making process
  - Communicate their decision by any means
- 2.4** An assessment must be made on the balance of probabilities and although more than likely the person does lack capacity you should be able to demonstrate in your records why you have come to that conclusion.
- 2.5** Sometimes your assessment may be challenged by another person acting for the individual such as a family member or advocate. Seek resolution in the following ways:
- Raise the matter with the person who made the assessment and check records.
  - A second opinion may be useful.
  - Involve an advocate but not an IMCA.
  - Local complaints procedure.
  - Mediation
  - Case conference
  - Ruling by Court of Protection

### 3. Best Interests Assessment

3.1 If a person has been assessed as lacking capacity to make that decision then the decision made for, or on behalf of, that person, must be made in his or her best interests. A best interest's decision must be objective; it is about what is in the person's best interests and not the best interests of the decision maker.

3.2 The decision maker must weigh up all the factors involved, consider the advantages and disadvantages of the proposals and determine which course of action is the least restrictive for the person involved. This includes consideration of restriction or deprivation of liberty.

3.3 By best interests we mean:

- The decision maker has considered all relevant circumstances, including any written statements made while the patient had capacity must also be taken into account and any other information relevant to this decision
- Equal consideration and non-discrimination - not to make an assumption that a decision is made merely on the basis of a person's age or condition,
- The decision maker has considered whether the person is likely to regain capacity – can the decision be put off until then?
- Permitting and encouraging participation - the person has been involved as fully as possible in the decision, with the appropriate means of communication or using other people to help the person participate in the decision making process. Healthcare professionals are therefore required to make enquiries of relatives, carer's and friends of the patient. Consideration must be given as far as reasonably ascertainable to the person's past and present wishes and feelings, and the beliefs, values and any other factors that would be likely to be taken into account if the person had capacity, and to take into account, if practicable and appropriate the views of people who have formally or informally been involved with, or named by, the incapacitated person.
- A special consideration for life sustaining treatment - the decision maker is **NOT** motivated by a desire to bring about the person's death.
- Taking into account the views of any IMCA or Attorney appointed by the person or the Court of Protection.
- Consider whether there is a less restrictive alternative or intervention that is in the person's best interests.

3.4 When determining someone's best interests you must be able to demonstrate:

- That you have carefully assessed any conflicting evidence and
- Provide clear, objective reasons as to why you are acting in the person's best interests.

3.5 As far as possible try to ascertain:

- Has the person set out their views in a document, appointed a person to act on their behalf, or do they have friends or family involved in their care?
- If practicable and appropriate you must consult with, and take in to account,

the views of the following:

- A Nominated Person
- Lasting Power of Attorney appointed
- Enduring Power of Attorney appointed
- Court Appointed Deputy
- Other persons engaged in caring for, or interested in, the person.

**3.6** A Best Interest Meeting will need to be arranged with the relevant consultees.

## **4. Challenging the Result of an Assessment of Capacity or Best Interests Decision**

**4.1** Your assessment of capacity may be challenged. It is important that everything you do is carefully documented.

**4.2** It may be challenged in the following ways

- Raised directly with you
- Request for a second opinion
- Involving an advocate – NOT an IMCA
- Complaints procedure
- Court of Protection

**4.3** **However** every effort should be made to resolve disagreements as informally as possible. Of importance are the following:

- How robust is the risk assessment?
- Has everything been recorded?
- Degree of 'contentiousness' of best interest decision between those involved in the person's care, i.e. the level of disagreement by family or IMCA as to proposed course of action?
- Is there a possibility of conflict of interest between family members and person, e.g. over finances?
- Urgency with which decision needs to be made?
- Degree to which decision/intervention can be reversed (undone)? The more irreversible, the higher the level of consultation required. Potential risks to the person and implications if a decision is made, not made or not reversed, including where other dependents are involved (e.g. children)

**4.4** The Code of Practice makes it clear that any dispute about the interests of a person who lacks capacity should be resolved in a quick and cost effective manner.

**4.5** Where significant persons are involved in the person's life every effort should be made to consult with, and involve, them and arrive at an agreed decision provided this is felt to be in that person's best interests and meets their assessed social and/or medical needs.

- 4.6** Where agreement cannot be reached seek assistance from your line manager or a senior manager in this process, further meetings may be necessary including seeking legal advice.
- 4.7** If no agreement can be reached the family or carers have recourse to the CCG complaints procedures of the agencies involved.
- 4.8** Recourse to the Court of Protection should be the last resort if no agreement can be reached. The equality and diversity lead should be consulted at this stage.

## Equality Analysis

### Equality Impact Assessment Screening

#### Step 1

As a public body organisation we need to ensure that all our strategies, policies, services and functions, both current and proposed have given proper consideration to equality and diversity, do not aid barriers to access or generate discrimination against any protected groups under the Equality Act 2010 (Age, Disability, Gender Reassignment, Pregnancy and Maternity, Race, Religion/Belief, Sex, Sexual Orientation, Marriage and Civil Partnership, Carers and Health Inequalities).

A screening process can help judge relevance and provides a record of both the process and decisions made.

This screening determines relevance for all new and revised strategies, policies, projects, service reviews and functions.

Completed at the earliest opportunity it will help to determine:

- The relevance of proposals and decisions to equality, diversity, cohesion and integration.
- Whether or not equality and diversity is being/has already been considered for due regard to the Equality Act 2010 and the Public Sector Equality Duty (PSED).
- Whether or not it is necessary to carry out a full Equality Impact Assessment.

#### Name(s) and role(s) of person completing this assessment:

Name: Bev Walker  
Role: Safeguarding Adults Lead

#### Title of the service/project or policy:

CCG CO ?? Mental Capacity Act 2005(MCA) and Deprivation of Liberty Safeguards (DoLS) policy

Is this a:

Strategy / Policy

Service Review

Project

If other, please specify:

#### What are the aim(s) and objectives of the service, project or policy:

That staff employed by, or seconded to, the CCG are aware of their roles and responsibilities in relation to MCA and DoLS in order to support the CCG in discharging its duties and responsibilities as a commissioner.

**Who will the project/service /policy / decision impact?**

Consider the actual and potential impacts:

- Staff
- service users/patients
- other public sector organisations
- voluntary / community groups / trade unions
- others, please specify:

Questions	Yes	No
Could there be an existing or potential impact on any of the protected characteristic groups?	Yes	
Has there been or likely to be any staff/patient/public concerns?	Yes	
Could this piece of work affect how our services, commissioning or procurement activities are organised, provided, located and by whom?	Yes	
Could this piece of work affect the workforce or employment practices?	Yes	
Does the piece of work involve or have an impact on: <ul style="list-style-type: none"> <li>• Eliminating unlawful discrimination, victimisation and harassment</li> <li>• Advancing equality of opportunity</li> <li>• Fostering good relations</li> </ul>	Yes	

**If you have answered no to the above and conclude that there will not be a detrimental impact on any equality group caused by the proposed policy/project/service change, please state how you have reached that conclusion below:**

**If you have answered yes to any of the above, please now complete the ‘STEP 2 Equality Impact Assessment’ document.**



## Governance, ownership and approval

Please state here who has approved the actions and outcomes of the screening		
Name	Job title	Date
Bev Walker	Safeguarding Adults Lead	06.11. .2019

# Equality Impact Assessment

## Step 2 Evidence Gathering

Name of person completing EIA: Bev Walker	
Title of policy/strategy/guidance: CCG CO?? Mental Capacity Act 2005(MCA) and Deprivation of Liberty Safeguards (DoLS) policy	
Existing: <input checked="" type="checkbox"/> New/proposed: <input type="checkbox"/> Changed: <input type="checkbox"/>	
What are the intended outcomes of this policy/service/process? Include outline of objectives and aims	
That staff employed by, or seconded to, the CCG are aware of their roles and responsibilities in relation to MCA and DoLS in order to support the CCG in discharging its duties and responsibilities as a commissioner.	
Who will be affected by this policy/strategy /guidance? (please tick) <input type="checkbox"/> Consultants <input type="checkbox"/> Nurses <input type="checkbox"/> Doctors <input checked="" type="checkbox"/> Staff members <input type="checkbox"/> Patients <input type="checkbox"/> Public <input type="checkbox"/> Other If other please state:	
<b>Current Evidence/Information held</b>	<b>Outline what current data/information is held about the users of the service / patients / staff / policy / guidance? Why are the changes being made?</b>
(Census Data, Local Health Profile data, Demographic reports, workforce reports, staff metrics, patient/service users/data, national reports, guidance ,legislation changes, surveys, complaints, consultations/patient/staff feedback, other)	5 CCG workforce data  Workforce data.docx  Please see below Health Profile data  cd health profiles.pdf  darlington health profiles.pdf  redcar health profile.pdf  middlesbrough health profile.pdf  hartlepool health profile.pdf

### Step 3 Full Equality Impact Assessment

**The Equality Act 2010 covers nine 'protected characteristics' on the grounds upon which discrimination and barriers to access is unlawful.**

Outline what impact (or potential impact) the new policy/strategy/guidance will have on the following protected groups:

#### **Age**

*A person belonging to a particular age*

There is no impact on any staff member belonging to a particular age group.

If training is required for this policy each CCG has accessible venues with good IT facilities for presentations with several screens placed within each room.

#### **Disability**

*A person who has a physical or mental impairment, which has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities*

The policy is available of the internet and will be made available in other formats where required, such as Braille, Audio, easy read etc.

Communications should be available in a range of formats for people with sensory and learning disabilities, e.g. Braille, audio, video, Easy Read etc., to ensure engagement in an exclusive way.

Arrangements should be made for venues that are accessible to all e.g. ramps for wheelchairs, disabled toilets, hearing loops, signing, interpreters/translators (where requested).

If training is required for this policy each CCG has accessible venues with good IT facilities for presentations with several screens placed within each room.

#### **Gender reassignment (including transgender) and Gender Identity**

*Medical term for what transgender people often call gender-confirmation surgery; surgery to bring the primary and secondary sex characteristics of a transgender person's body into alignment with his or her internal self perception.*

The content of the policy does not include vocabulary that should cause offense.

**Marriage and civil partnership**

*Marriage is defined as a union of a man and a woman or two people of the same sex as partners in a relationship. Civil partners must be treated the same as married couples on a wide range of legal matters*

If reference is made to partnerships no distinction is made between married or civil partnerships

**Pregnancy and maternity**

*Pregnancy is the condition of being pregnant or expecting a baby. Maternity refers to the period after the birth, and is linked to maternity leave in the employment context.*

There are no implications for pregnancy or those members of staff on maternity or paternity leave.

**Race**

*It refers to a group of people defined by their race, colour, and nationality, ethnic or national origins, including travelling communities.*

The policy does not negatively impact on race, however there are issues associated with race and culture that need to be considered so that the service provided is accessible and appropriate. For example staff are aware that interpreters may be needed where there are language barriers and information can be provided in other languages.

**Religion or Belief**

*Religion is defined as a particular system of faith and worship but belief includes religious and philosophical beliefs including lack of belief (e.g. Atheism). Generally, a belief should affect your life choices or the way you live for it to be included in the definition.*

Although the policy does not negatively impact on people on the grounds of religion or belief, there may be issues associated with religion or belief that need to be considered.

**Sex/Gender**

*A man or a woman.*

The policy has no impact as it does not discriminate between males and females

**Sexual orientation**

*Whether a person's sexual attraction is towards their own sex, the opposite sex or to both sexes*

Policy uses appropriate language no additional considerations are required

**Carers**

*A family member or paid helper who regularly looks after a child or a sick, elderly, or disabled person*

The policy is accessible on the CCG intranet whilst staff are at work and on the public facing CCG internet.

**Other identified groups relating to Health Inequalities**

*such as deprived socio-economic groups, rural areas, armed forces, people with substance/alcohol abuse and sex workers.*

*(Health inequalities have been defined as “Differences in health status or in the distribution of health determinants between different population groups.”*

*Health inequalities can therefore occur across a range of social and demographic indicators, including socio-economic status, occupation, geographical locations.)*

Other groups have been considered however as the policy is for staff there are no additional impacts on health inequalities.

**Step 4 Engagement and Involvement**

Have you engaged stakeholders in testing the policy/guidance or process proposals including the impact on protected characteristics?

The 5 CCG Designated Nurses for Safeguarding Adults have been involved in the revision of the policy

If no engagement has taken place, please state why:

**Step 5 Methods of Communication**

What methods of communication do you plan to use to inform service users/staff about the policy/strategy/guidance?

- |   |   |
|---|---|
| <input checked="" type="checkbox"/> Verbal – meetings | <input type="checkbox"/> Verbal - Telephone   |
| <input type="checkbox"/> Written – Letter             | <input type="checkbox"/> Written – Leaflets/guidance booklets                               |
| <input type="checkbox"/> Written - Email              | <input checked="" type="checkbox"/> Internet/website <input type="checkbox"/> Intranet page |
| <input type="checkbox"/> Other                        |   |

If other please state:

## Step 6 Potential Impacts Identified – Action Plan

Ref no.	Potential/actual Impact identified	Protected Group Impacted	Action(s) required	Expected Outcome	Action Owner	Timescale/ Completion date
	None identified.					

### Sign off

Completed by:	Bev Walker
Date:	06.11.2019
Presented to: (appropriate committee)	
Publication date:	