

## 7. Further Information and Resources

- ❑ 39 Essex Chambers Guidance Note: [MCA Guidance Relevant Information for Different Categories of Decision](#)
- ❑ 39 Essex Chambers Guidance Note: [Carrying Out and Recording Capacity Assessments](#)
- ❑ SCIE: [LPS latest](#)
- ❑ NICE Guidance: [Decision Making and Mental Capacity](#)
- ❑ Tri-X: [Mental Capacity Act 2005 Resource and Practice Toolkit](#)

## 6. Key Considerations

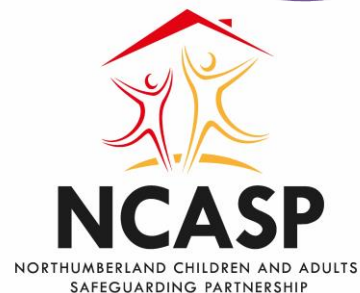
- ❑ The main aim of the MCA (2005) is to empower people to have control over their own health and welfare decisions and, where they cannot, offer safeguards when those decisions need to be made on their behalf.
- ❑ Remember assessments of capacity are **TIME** and **DECISION** specific
- ❑ You must have evidence to show why you believe someone lacks capacity and show the steps you have taken to support the person to understand the relevant information.
- ❑ In complex situations where capacity has been considered, it should be recorded whether or not a capacity assessment has been carried out. Where a capacity assessment has not been undertaken in these situations you should record your rationale for that decision. (*SAR Recommendation: Leanne Patterson, Northumberland*)

## 5. Deprivation of Liberty Safeguards (DoLS)

- ❑ DoLS exist to ensure that a person who lacks capacity to make a decision about their care/treatment, is not arbitrarily deprived of their Article 5 Human Right of Liberty.
- ❑ A DoLS authorisation should be sought in circumstances where the following criteria is met:
  - A person lack capacity to consent to the arrangements for care/support/treatment
  - The arrangements mean they will be under constant supervision and control, and
  - The person is not free to leave the premises where the arrangements are being made
- ❑ The Managing Authority (Hospital/Care Home) would need to apply to the Supervisory Body (Local Authority) for authorisation.
- ❑ For deprivations within Independent Supported Living services (ISL's) and a person's own home, the authorisation would need to be sought from the Court of Protection.
- ❑ The DoLS apply to anyone from the age of 18 however, young people between 16 – 18 may also be deprived of their liberty and in these cases authorization would be required from the Court of Protection also.
- ❑ The current Parliament have decided not to introduce the Liberty Protection Safeguards (LPS) and therefore the DoLS process remains in place.

## 1. The Mental Capacity Act (MCA) 2005

- ❑ MCA applies to anyone aged 16 or over. The primary aim of the MCA is to promote and safeguard decision making within a legal framework.
- ❑ The MCA promotes empowerment for people to have control about the decisions that affect them and offers protection for those who may not be able to make their own decisions.
- ❑ The MCA builds on respect for Human Rights and is underpinned by a set of 5 Key Principles (see below).
  - Presumption of capacity – everyone has capacity unless determined otherwise
  - Take all practicable steps to support the person to make their own decisions (including relevant information)
  - Unwise Decision Making – does not mean a person lacks capacity
  - Best Interest Decisions – acting in a person's best interests when they cannot make the decision themselves
  - Less Restrictive Intervention – ensuring best interest decisions are the less restrictive of basic human rights.
- ❑ Everyone working with (or caring for) any person from the age of 16 must comply with the Act and associated Code of Practice. [Mental Capacity Act Code of Practice - GOV.UK \(www.gov.uk\)](#)



## 2. Assessing Capacity

- ❑ The process for assessing a person's capacity to make a decision is laid out in the Code of Practice, however, a Supreme Court Judgement in 2022 (A LA v JB) has changed the order of the 2-stage test which is now as follows:
  - ❑ **Stage 1** (functional test) - Can the person:
    - Understand the relevant information for the decision to be made (using Principle 2)
    - Retain the information (at least until the end of the test of capacity)
    - Weigh up the information (consider the pro's and cons)
    - Communicate their decision (particularly where the person may have difficulties in this respect)
  - ❑ **Stage 2** (diagnostic test):
    - Does the person have an impairment/disturbance in the functioning of the mind/brain? (Permanent or temporary including substance misuse)
  - ❑ More recent [Case Law](#) draws on the four questions identified in the Supreme Court Judgement that need to be answered when deciding whether someone has capacity:
    1. What is the 'matter' (what is the decision that P has to make?)
    2. What is the information relevant to that decision? (See Sec: 3)
    3. Is P unable to make a decision on the 'matter'? (Stage 2 Functional Test)
    4. If P is unable to make a decision on the matter, is that inability caused by a disturbance in the functioning of the mind or brain? (Causative nexus)
- NB: Diagnosis is not required. Mr Justice MacDonald confirmed that the wording of Section 2 (1) itself does not require a formal diagnosis.

## 4. Best Interest Decisions

- ❑ Best Interest Decisions should only be made when a person has been assessed as lacking capacity and this is due to an impairment/disturbance of mind/brain function.
- ❑ Before a Best Interest Decision is made consider whether the decision can wait until the person regains capacity (if incapacity is temporary). If the decision is not urgent, we should wait until the person regains capacity to make the decision for themselves.
- ❑ We must follow the Best Interest checklist when determining Best Interest Decisions on behalf of the person – see Section 5 of the [MCA Code of Practice](#)
- ❑ Where a Best Interest Decision is made on behalf of a person who lacks capacity, we must ensure the decision reached is the Less Restrictive option (Key Principle 5)
- ❑ Where the only option available is likely to deprive a person of their Article 5 Human Right of Liberty then legal safeguards must be applied. These are known as the Deprivation of Liberty Safeguards (DoLS) see Section 5

## 3. Relevant Information

- ❑ In determining whether a person can understand the relevant information in relation to the decision, assessors need to ensure that the matter/decision is correctly formulated.
  - ❑ In North Bristol NHS Trust v R (2023), the Judge stated that the minimum information required in which the capacity decision is recorded should be “*a careful and succinct account of the formulation of the matter to be decided and the formulation of the relevant information in respect of the matter, together with a careful and concise account of how the relevant information was conveyed and with what result.*”
- Assessors should be able to evidence the relevant information in their assessments and what practicable steps they took to support the person to understand it (Principle 2). See Sec. 7 for Case Law Guidance on the relevant information to be considered for a range of social care decisions (39 Essex Chambers)