

# Mental Capacity Act 2005

## Competency Toolkit

The MCA is a law that affects all of us. Anyone in any position where interaction with the public is a part of their role will need to have a basic awareness of the principles of the Act and what it means to them in their roles.



Mental Capacity Act 2005

**Authored by Bexley Safeguarding Adults Board**  
*Helping adults to live a life free from abuse or neglect*



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## Purpose of the MCA Toolkit

This toolkit incorporates and links to a number of other professional competency standards, for example the National Safeguarding Competence Framework and the Best Interest Assessors (BIA's) capabilities. This toolkit is divided by staff group and is focused on what different groups need to demonstrate under each of the 5 principle areas with the expectation that all professional groups working in health and social care in the London Borough of Bexley will adhere to the professional competency framework embedded in this toolkit.

## What is Professional Competency?

Each professional competency standard within this toolkit refers to a combination of skills, knowledge and experience expected of individual staff. This toolkit aims to ensure that these qualities inform MCA best practice in a way that is consistent with an individual's occupational role and responsibility.

Competency involves being able to demonstrate the ability to be critically reflective and self-aware as you analyse, review and evaluate your skills, knowledge and professional practice, exploring alternative approaches and being open to change. It also identifies a line manager's duties and responsibilities.

## Managers carrying out the assessment of competency

**Note: Senior Managers Chief Executives and Governing Bodies must have systems to provide assurances that all aspects of the Mental Capacity Act are in place, monitored and reviewed.**

Managers have a statutory responsibility to their workforce and the individuals they provide services for.

The assessment of competencies should be undertaken by an appropriate competent staff member such as a supervisor. This can combine a mix of direct observation of practice, discussion and questioning in supervision and appraisal meetings.

All staff and volunteers should be helped to develop MCA competencies. This can be done by participating in formal training and development opportunities. However, there are also many opportunities for staff to learn and develop within the workplace, for example, discussions in team meetings, shadowing with more experienced staff, and mentoring opportunities.

## **Introduction on the Mental Capacity Act**

The Mental Capacity Act was designed in 2005 for everyone 16+ to make decisions including the right to make unwise decisions.

The Act was fully implemented in October 2007, and in April 2009 the Deprivation of Liberty Safeguards (DoLS) was added. In 2007 and 2008 for the first time health, social care and other public sector professionals had a clear framework that they could use to think mental capacity and best interest decision making in a way that promotes the individuals rights.

The application of the MCA are for those working in health and social care, providing services of treatment and support of people over the age of 16 who live in England and Wales. It provides a clear framework for assessment and decision making.

**The MCA also introduced new roles, bodies and powers in support such as:**

- **Attorneys appointed under lasting power of attorney**
- **New court order protection, and court –appointed deputies**
- **Office of the public guardian**
- **Independent Mental Capacity Advocates (IMCA's)**
- **Advance decisions to refuse treatment**
- **Criminal offence of ill-treatment or neglect**

Before the legislation the way in which people worked and understood mental capacity was variable, which often made global judgment based on a diagnosis of people behaviour, rather than a clear understanding of what capacity might mean for each person. This document has been developed by the Bexley Safeguarding Adults Board (BSAB) to ensure that individual's rights are maintained by all professionals working with people at risk in the London Borough of Bexley.



Mental Capacity Act 2005

## The Statutory Core Principles of the Mental Capacity Act (MCA) 2005

The importance of the statutory core principles of this Act is clear, with the principles included in the primary legislation, as section 1 (s.1) of the MCA, with chapter 2 of the accompanying 2007 Code of Practice devoted to their application in practice.

The principles have statutory status – this means they are part of the legal framework rather than best practice guidance. Therefore all those working with individuals experiencing problems with their mental capacity and/or decision-making must ensure that their actions or inactions are guided by them.

**Note: Whilst the assessment is a three parts, professionals should pick up both simultaneously.**

# Remember to apply the **5** and **3** in all you do

### Five Guiding Principles

- 1) Presume capacity
- 2) Do all you can to support decision making
- 3) Do not conclude someone lacks capacity just because they make an unwise decision
- 4) If the person lacks capacity for a decision you must act in their best interest and
- 5) You must aim to choose the less restrictive option

### Three Assessments:

#### Functional test:

Can the person -

- Understand the information relevant to the decision
- Retain the information long enough to make a decision
- Use and weigh the information to make a decision
- Communicate their decision, by any means

#### Diagnostics test:

You need some evidence that the person has an impairment or disturbance in the functioning of mind or brain. Because of this impairment they must be unable to satisfy the test.

Explain why the person is unable to make the specific decision because of the impairment of, or disturbance in the functioning of, the mind or brain.

If the person cannot meet any one of the functional test **because** of the mental impairment / disturbance then they lack capacity for the specific decision at this point in time.

## Decision-Making Authorities (Powers) Note: this section does not address DOLS

We understand that this section may be difficult for families, carers and even professionals working in the health and social care sector. The below is a summary of the Decision-Making Authorities (Powers) that can and should be used.

Under the MCA, it is clear where the authority for decisions should be sought when the person themselves is unable to make a given decision.

The Act includes several ways that the person can plan for the future (e.g. via advance decisions and Lasting Powers of Attorney (LPA) for either/both property and affairs and health and welfare decisions). It also contains a framework for working out what might be in the person's best interests.

Where there is no applicable Lasting Power of Attorney in place and a decision needs to be made there are two possible options in terms of decision-making authorities.

They are:

1. For day-to-day decisions where the individual is not appearing to object (for example personal care, social activities, accommodation decisions and support plans) the person intending to carry out the intervention will be the most appropriate person to make the decision;
2. For more complex decisions, for example, in relation to end-of-life care or serious medical treatment that may have significant complications or risks, or where the person is deprived of their liberty and objecting, it may be that a referral to the Court of Protection is appropriate. **The court can make decisions directly, or where ongoing decisions may be needed the appointment of a deputy may be required. Staff in all groups should seek advice and support from their own managers and legal departments where more complex or serious decisions need to be made.**

### Essential Awareness – 'The MCA Affects us All'

Understanding that mental capacity is to be assumed unless there is a reason to question and assess it. (however case law shows that by nature of requiring assessment per user notice)

Understanding that the onus is on the worker to determine incapacity to make a specific decision at the time it needs to be made on the balance of probabilities, not on the person to prove they have capacity.

Ability to use communication and engagement skills to support a person who has difficulties with mental capacity to make (or take part in) decisions for/about themselves.

Knowledge of how capacity is defined and that mental capacity is time and decision specific.

Knowledge and understanding of the statutory principles and how they underpin any decisions or actions.

Knowledge that the decision maker may be a person with relevant legal powers, such as an Attorney appointed under an LPA, the person most appropriate in each decision being made if there is no Attorney or Deputy, or in some cases referral to the court is required.

Understanding of supported decision making and the steps that should be taken to involve individuals in their own lives.

Knowledge of, and confidence to report concerns and request input from others and consult with both the person and their family and supporters.

Knowledge of and confidence to report when a person may be deprived of their liberty

## Decision-Makers

### Person

In the first instance the person would make their own decision however where they are unable to, section 4 and 5 of the Mental Capacity Act 2005 are applicable. The following gives guidance.

### Communication for consent

The MCA principles require a person to be fully informed of the decision to be made, the options available and the potential outcome of any decision.

For a person to be fully informed, time should be spent discussing their options and clearly informing them of any foreseeable outcomes and impact of the different options available to them.

An informed decision can only be achieved once the person is clear about all the options available to them and the potentially or likely outcomes of each of those options.

Where there are language difficulties it is imperative that support should be gained. This is most appropriately achieved through translation services and is not always effective to use family members in MCA discussions.

All practicable steps should be taken to help the person to understand.

### Advance Decisions to Refuse Treatment

Under the Mental Capacity Act 2005, these types of decisions have legal status. An advance decision can only be made by a person if they are over the age of 18 and have capacity to make that decision. Note: They relate to medical decisions, and the statement must state which treatment they are refusing. The decision can be amended at any time by the person themselves.

Staff and professionals seeking to provide treatment, once the person has lost capacity to decide for themselves, will need to check whether an advance decision exists, if it does is it valid (i.e. the person has not altered the decision) and is it applicable to the treatment being proposed. A valid and applicable advance decision to refuse treatment has the same effect as the person making the decision themselves at the time it needs to be made. The advance decision may be communicated verbally, or where it concerns life-sustaining or lifesaving treatment, in writing.



A person can stipulate what they would like to happen if certain situations arise. Such a statement may form part of their care plan or maybe recorded separately. It is not legally binding, but it should be considered if a best interest's decision has to be taken on the person's behalf.

### **Family (often referred to as NOK) and Friends**

Family and friends historically known as Next of Kin (NoK) is commonly used and there is a presumption that such a person has certain rights and duties; this is not actually the case. Staff and professionals may seek to consult the family and friends but that person cannot consent to anything on the person's behalf unless they have a Lasting Power of Attorney or other authority to make the decision (e.g. deputyship, EPA). Seeking consent from family and friends is a mistake often made in public sector settings, as it is not a legally valid consent.

### **Lasting Powers' of Attorney**

Before the Mental Capacity Act was introduced, there was an arrangement called an Enduring Power of Attorney (EPA). These are now less common but there are still a small number in existence. These relate to financial and property matters only.

The MCA creates a system in which the person can select who they want to make decisions on their behalf and the decisions which they will have authority to make; these are called Lasting Power of Attorney (LPA).

There are two types of LPA one for property and affairs, including finances, and one for health and welfare, including medical treatment and accommodation. For an LPA to be valid it must be registered with the Office of the Public Guardian OPG) before it can be used.

### **The Mental Capacity Act Code of Practice states:**

***7.30: An attorney can only consent to or refuse life-sustaining treatment on behalf of the donor if, when making the LPA, the donor has specifically stated in the LPA document that they want the attorney to have this authority.***

***7.31: As with all decisions, an attorney must act in the donor's best interests when making decisions about such treatment. This will involve applying the best interest checklist (see chapter 5, MCA) and consulting with carers, family members and others interested in the donor's welfare. In particular, the attorney must not be motivated in anyway by the desire to bring about the donor's death (see paragraphs 5.29-5.36, MCA). Anyone who doubts that the attorney is acting in the donor's best interest can apply to the court of protection for a decision.***



## **Court of Protection and Court Appointed Deputies**

Where a person has not made an advance decision or LPA decision or series of decisions need to be made it may be necessary to apply to the Court of Protection. In these cases, the Court may make a specific judgement or, where a number of decisions may need to be made, appoint a Deputy to continue to act in the person's best interests if they are unable to decide for themselves.

## **Office of the Public Guardian**

The Office of the Public Guardian (OPG) has an important role in both registering LPAs – health and welfare and property and affairs – and supervising deputies. They can also investigate concerns about deputies or attorneys acting under a registered EPA or LPA.

## **Wilful Neglect**

Anyone who is caring for a person without capacity must deliver the standard of care expected of them. Failure to do so could result in criminal prosecution.

This is not limited to paid workers and may affect family carers



## Making Decisions

One of the key principles of the Act is that any act done for, or any decision made on behalf of a person who lacks capacity must be done, or made, in that person's best interests. That is the same whether the person making the decision or acting is a family carer, a paid worker, an attorney, a court appointed deputy, or a healthcare professional, and whether the decision is a minor issue- like what to wear- or a major issue, like whether to provide particular healthcare.

As long as these acts of decisions are in the best interests of the person who lacks capacity to make the decision for themselves, or to consent to acts concerned with their care or treatment, then the decision maker or carer will be protected from liability.

As long as the person who acts or makes the decision has followed the steps to establish whether a person has capacity, and done everything they reasonably can to work out what someone's best interests are, the law should protect them.

When the person lacks capacity to make their own decisions, and there is no other decision-making authority in place, it may be necessary for someone else, often a staff member or other professional, to make the decision for the person. These are called best interest decisions, and should be made by the person best placed and proposing to make the decision (e.g. if it is a medical decision, the doctor is likely to be best placed; a social care decision, the social worker; a fire safety risk, the fire officer, etc.).

This principle covers all aspects of financial, personal welfare and healthcare decision making and actions. It applies to anyone making decisions or acting under the provisions of the Act, including:

- Family carers, other carers and care workers
- Healthcare and social care staff
- Attorneys appointed under a Lasting Power of Attorney or registered Enduring Power of Attorney
- Deputies appointed by the court to make decisions on behalf of someone who lacks capacity, and
- The court of protection

However the Act's first key principle is that people must be assumed to have capacity to make a decision or act for themselves unless it is established that they lack it. That means that working out a person's best interest is only relevant when that person has been assessed as lacking, or is reasonably believed to lack, capacity to make the decision in question or give consent to an act being done.

People with capacity are able to decide for themselves what they want to do. When they do this, they might choose an option that other people don't think is in their best interests. That is their choice and does not, in itself, mean that they lack capacity to make those decisions, (see e.g. the CH case about failure to support in sex education).

### Exceptions to the best interest principle

There are two circumstances when the best interest principle will not apply. The first is where someone has previously made an advance decision to refuse medical treatment while they had the capacity to do so. Their advance decision should be respected when they lack capacity, even if others think that the decision to refuse treatment is not in their best interests.

The second concerns the involvement in research, in certain circumstances of someone lacking capacity to consent.

## The Best Interest Checklist

1. Do not discriminate- avoid assumptions

2. Does the decision need to be made now? Might the person regain capacity?

3. Consult with others including family, care providers and other professional's involved

4. Find out what values and beliefs the person holds, take these into account

5. Be person centred, involve the person in the decision

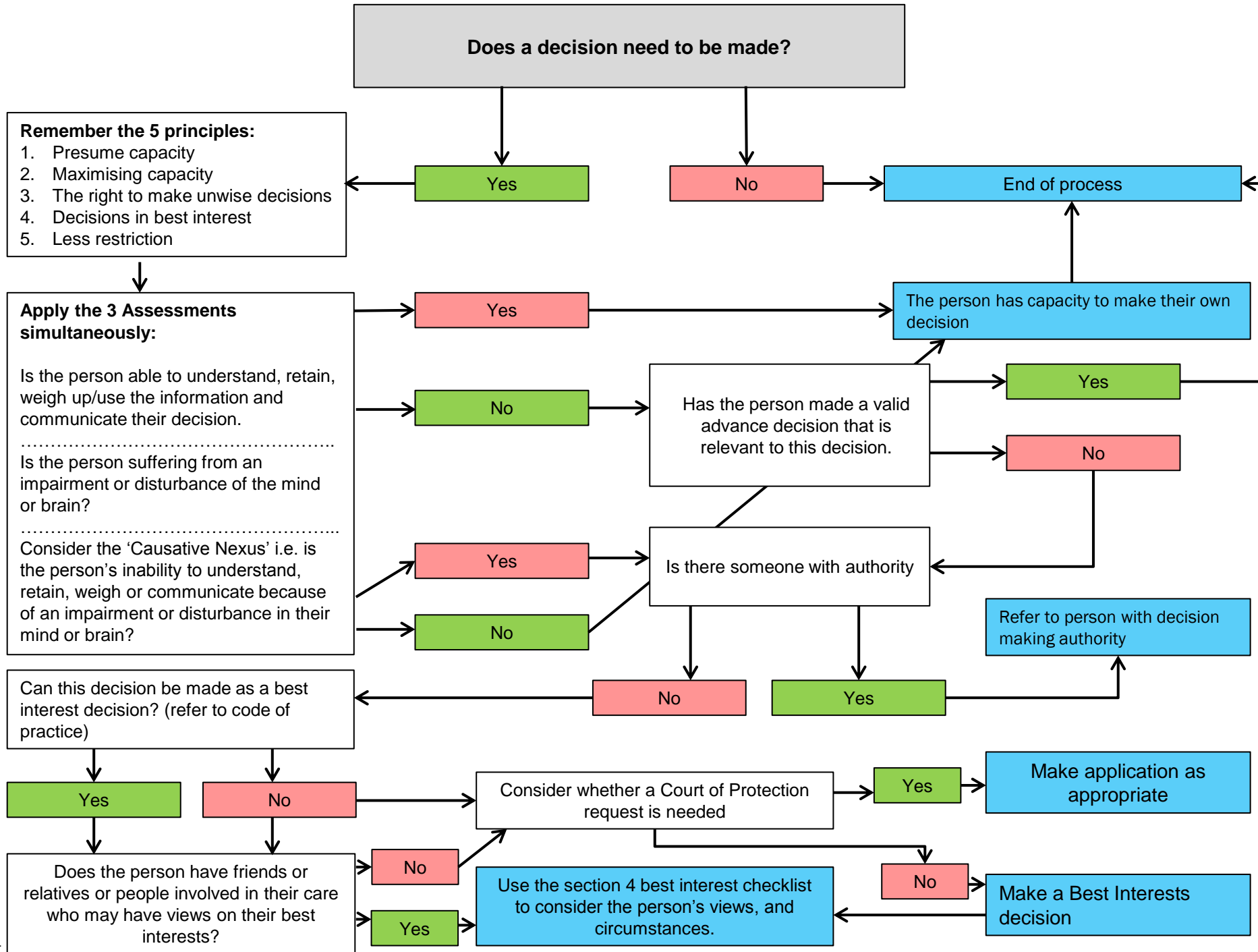
6. Do a balance sheet approach for all options, i.e. benefits and disadvantages. Avoid risk averse approaches.

Is there an LPA? Is the decision within their power to make? Is there an advance decision to refuse medical treatment?

Involve the Independent Mental Capacity Advocate's if appropriate (unbefriended, and decisions about serious medical treatment or care environment). Take the Independent Mental Capacity Advocate's views into account

Every best interest decision must be recorded and justify how this is the less restrictive approach and in the person's best interest

**Remember to apply the 5 and 3 in all you do**



**Remember the 5 principles:**

1. Presume capacity
2. Maximising capacity
3. The right to make unwise decisions
4. Decisions in best interest
5. Less restriction

**Apply the 3 Assessments simultaneously:**

Is the person able to understand, retain, weigh up/use the information and communicate their decision.

Is the person suffering from an impairment or disturbance of the mind or brain?

Consider the 'Causative Nexus' i.e. is the person's inability to understand, retain, weigh or communicate because of an impairment or disturbance in their mind or brain?

Can this decision be made as a best interest decision? (refer to code of practice)

Does the person have friends or relatives or people involved in their care who may have views on their best interests?

Does a decision need to be made?

Yes

No

End of process

Yes

The person has capacity to make their own decision

No

Has the person made a valid advance decision that is relevant to this decision.

Yes

No

Yes

Is there someone with authority

No

Refer to person with decision making authority

No

Yes

Make application as appropriate

Consider whether a Court of Protection request is needed

Yes

No

Use the section 4 best interest checklist to consider the person's views, and circumstances.

No

Make a Best Interests decision

Yes

## Table of evidence in your professional role:

This table shows you the evidence levels that are needed for your professional role

Professional roles	Evidence Level 1	Evidence Level 2	Evidence Level 3	Evidence Level 4
<b>Professional Roles Covered in this level:</b> Public service workers in all settings, who may have day-to-day contact with individuals for whom mental capacity in all, or certain, areas of their lives may be an issue or concern	X			
<b>Professional Roles Covered in this level:</b> Responsible for the operational delivery of health, care or other services providing treatment, personal care or other social support packages	X	X		
<b>Professional Roles Covered in this level:</b> Providing care, treatment, assessment or other intervention – medical, psychological and social, or responsible for commissioning such services.	X	X	X	
<b>Professional Roles Covered in this level:</b> To provide leadership, management and/or appropriate governance within organisations and ensure organisational policies and procedures are legally compliant and promote best MCA practice.	X	X	X	X

## Evidence Level 1

**Professional Roles Covered in this level:** Public service workers in all settings, who may have day-to-day contact with individuals for whom mental capacity in all, or certain, areas of their lives may be an issue or concern.

**Including, but not limited to:** Care assistants, Unqualified social care staff, Care home workers, Home care workers, Health care assistants, Support workers, Community support workers, STR workers, Transitions workers, Personal assistants, Volunteers, Befrienders, mentors and advisers, Medical receptionists, Service receptionists, ward clerks and other admin with service user contact, Social Care Customer Service staff, Housing Staff, Adult Foster Carers, Fire service, Vulnerable Persons Officers (VPO) (or equivalent), Community policing staff.

### Statutory Competency Principles

### Evidence

#### 1. Presume Capacity

Individuals are able to make their own decisions unless they lack the capacity to do so, which must be proved by the person who is seeking to make the decision on the person's behalf.

Capacity should only be assessed if there is a reason to doubt that the person is able to take a particular decision at a specific time; it does not relate to a particular diagnostic label. If there is reason to doubt, then you do have to assess and explain why you are proceeding on the basis of the person's capacitous decision.

- Understand their roles and responsibilities in relation to the Mental Capacity Act 2005 and be able to explain this to others.
- knowledge of the first principle of the MCA and apply it to all interactions with people within their services provided. Assumption is when evidence is not attainable
- Understand the meaning of mental capacity in relation to how services are provided
- Application of the time-specific and decision-specific nature of mental capacity as it applies to their services provided.
- Identify concerns that would lead to an assessment of capacity being made and articulate these.
- Identify the specific decision in each case and who might be the most appropriate person to assess capacity where there is a concern evident.
- Understand and apply organisational policies and procedures in relation to mental capacity and assessment of mental capacity.
- Maintaining appropriate records where an assessment is necessary.

## 2. Do all you can to support decision making

A person must be given all possible help before anyone treats them as not being able to make their own decisions. This means you must make every effort to encourage and support people to make the decision for themselves, for example, treating conditions that may undermine capacity, considering deferring the decision until capacity is improved, ensuring all information is given in a way the person can understand.

Communication and engagement skills are essential for anyone working with those affected by difficulties with their ability to make a/some decisions themselves.

If lack of capacity is established, it is still important that you involve the person as far as possible in making decisions

- Understanding of the second principle of the MCA and staff responsibility to support people to make their own decisions wherever possible.
- Recognise and respond to a person's communication needs and recognise when additional communication aids are needed (e.g. signers, interpreters, braille etc.).
- Providing information in a range of formats relevant to the person's needs and understanding (e.g. easy read, pictorial, audio descriptions, etc.).
- Considering environmental or other factors that might impact on a person's capacity (e.g. time of day, noise levels, who else is present).
- Listening to individuals and allowing individuals time to communicate any preferences and wishes.
- Utilising effective communication and engagement skills to maximise the person's capacity to make a decision.
- be able to understand and act on coercive behaviour and the impact that it may be having on someone's ability to make their own decisions.

## 3. Do not conclude someone lacks capacity just because they make an unwise decision

A person should never be considered to be lacking capacity solely on the basis of a decision or decisions that appear unwise or otherwise not in the person's best interests.

People prioritise risk differently, they value different things and are entitled to make decisions that are not only unwise but may also be damaging to their health or welfare if they are able to understand, retain, and weigh up the relevant information in order to make that decision and are able to communicate their decision.

- Understanding of the third principle of the MCA and the individual's right to exercise freedom of choice and individuality.
- Understand that people with capacity can make decisions others think are unwise.
- Understand that a safeguarding referral may be needed even if a person has capacity and their consent for this should be sought wherever possible with decisions only being made in the person's best interests, where they are shown to lack capacity in relation to the decision. **Note you can make a safeguarding referral even where capacitous person doesn't want you to...**
- Undertake risk assessments with the person as appropriate to role.
- Recognise and maintaining the importance of record keeping.
- in relation to information sharing where risks are identified.
- Work within General Data Protection Regulation (EU) 2016

4. If the person lacks capacity for a decision you must act in their best interest	
<p>Any decision taken on behalf of someone should consider all the factors relevant to them, including their wishes and feelings, the views of others, beliefs and medical, social and emotional welfare, using the section 4 checklist as a guide to 'working-out' what might be in a person's best interest.</p> <p>Actions taken in relation to the person's care, treatment or other supports are based on a decision that reflects the person's best interests in the most holistic way possible.</p>	<ul style="list-style-type: none"> <li>• Understanding of the fourth principle of the MCA and how it should underpin any actions or decisions taken where a person has been shown to lack capacity for a specific decision.</li> <li>• Understand that best interests can only be considered if the evidence shows that person has been shown to lack capacity in relation to a specific decision.</li> <li>• Apply the best interest decision-making processes relevant to role and relationship with the person in question.</li> <li>• Understanding of how personal values and attitudes can influence decision making.</li> <li>• Understand and apply organisational policies and procedures in relation to best interest decision-making processes.</li> </ul>
5. You must aim to choose the less restrictive option	
<p>Any interventions take account of whether there is a less restrictive way of achieving the same purpose with an emphasis on reducing restrictions wherever possible.</p> <p>Any restrictions placed upon a person are considered in terms of whether they are a proportionate response to any restrictions on the person's rights and freedoms, whether direct or indirect (e.g. the result of harm to others).</p> <p>An individual's rights must always be balanced against any risk of harm and any restrictions must be only applied if it is determined to be in a person's best interests</p>	<ul style="list-style-type: none"> <li>• Understand what restrictions are and whether they can be achieved in the less restrictive way</li> <li>• Understand where restrictions are being used which may be out of proportion to the evidence of risk of harm and know how to raise a concern in relation to this.</li> <li>• Understand, and application of, organisational policies and procedures in relation to any necessary restrictions relevant to role, and how and when these should be applied, reviewed and recorded.</li> </ul>



## Evidence Level 2

**Professional Roles Covered in this level:** Responsible for the operational delivery of health, care or other services providing treatment, personal care or other social support packages

**Including, but not limited to:** Care home managers, Home care coordinators and managers, Ward Managers, Other residential or nursing provider service managers, Supported housing and extra care managers, Other housing, health and social care provider services managers. Children & Family Social Workers, Adult Newly-Qualified Social Workers, , Occupational Therapists, Phlebotomists, Other Allied Health Professionals, Preparing for adult hood team, Care leaving team, probation services

Statutory Competency Principles	Evidence
<b>1. Presume Capacity</b>	
<p>Individuals are able to make their own decisions unless they lack the capacity to do so, which must be proved by the person who is seeking to make the decision on the person's behalf.</p> <p>Capacity should only be assessed if there is a reason to doubt that the person is able to take a particular decision at a specific time; it does not relate to a particular diagnostic label. If there is reason to doubt, then you do have to assess and explain why you are proceeding on the basis of the person's capacitous decision.</p>	<ul style="list-style-type: none"> <li>• A thorough understanding of the Mental Capacity Act (MCA) and Code of Practice and be able to apply these in practice. They should always begin from the presumption that individuals have capacity to make the decision in question.</li> <li>• Understand how to make a capacity assessment, the decision and time-specific nature of capacity and hence the need to reassess capacity appropriately. They should know when and how to refer.</li> <li>• Understand and apply the principle in practice.</li> <li>• Understand and apply policies and procedures and recognise that capacity should only assess where a concern about capacity is identified.</li> <li>• A working understanding of how and when capacity should be assessed.</li> </ul>
<b>2. Do all you can to support decision making</b>	
<p>A person must be given all possible help before anyone treats them as not being able to make their own decisions. This means you must make every effort to encourage and support people to make the decision for them, for example, treating conditions that may undermine capacity, considering deferring the decision until capacity is improved, ensuring all information is given in a way the person can understand.</p>	<ul style="list-style-type: none"> <li>• Recognise and provide the importance of communication skills and identify the tools and training needed to support different styles and forms of communication.</li> <li>• Recognise where general or Independent Mental Capacity Advocates (IMCA) may be appropriate and beneficial to support a person to make a decision.</li> </ul>

<p>Communication and engagement skills are essential for anyone working with those affected by difficulties with their ability to make a/some decisions themselves.</p> <p>If lack of capacity is established, it is still important that you involve the person as far as possible in making decisions</p>	<ul style="list-style-type: none"> <li>• Use a range of communication methods to help people make their own decisions wherever possible.</li> <li>• Seek specialist communication support where necessary.</li> <li>• Understand how principle 2 links to the personalisation and Care Act 2014 responsibilities for supported decision making and co-productive approaches.</li> <li>• Understand their responsibilities for people who are assessed as lacking capacity at a particular time and must ensure that they are supported to be involved in decisions about themselves and their care as far as is possible. Where they are unable to be involved in the decision-making process, decisions should be taken in their best interests following consultation with all appropriate parties, including families and carers. Professionals must seek to ensure that an individual's care plan is the less restrictive possible to achieve the intended outcomes.</li> <li>• Understand the likely impact of coercion on someone's mental capacity (regardless of whether they have an impairment of their mind or brain)</li> </ul>
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**3. Do not conclude someone lacks capacity just because they make an unwise decision**

<p>A person should never be considered to be lacking capacity solely on the basis of a decision or decisions that appear unwise or otherwise not in the person's best interests.</p> <p>People prioritise risk differently, they value different things and are entitled to make decisions that are not only unwise but may also be damaging to their health or welfare if they are able to understand, retain, and weigh up the relevant information in order to make that decision and are able to communicate their decision.</p>	<ul style="list-style-type: none"> <li>• Knowledge of the Human Rights Act 1998.</li> <li>• Where there is no concern over capacity, Professionals should take all practicable steps to empower people to make their own decisions, recognising that people are experts in their own lives and working alongside them to identify person-centred solutions to risk and harm, recognising the individual's right to make "unwise" decisions.</li> <li>• Understand the meaning of 'adult at risk' as defined in relevant policy guidance, e.g. Care Act 2014 definition and undertake / supervise / oversee the assessment of risk in situations where a person's capacity is a concern, taking appropriate steps to support and/or safeguard as appropriate.</li> <li>• Consideration of the most appropriate and proportionate response to restrictions on a person's rights and freedom of action.</li> </ul>
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#### 4.If the person lacks capacity for a decision you must act in their best interest

Any decision taken on behalf of someone should consider all the factors relevant to them, including their wishes and feelings, the views of others, beliefs and medical, social and emotional welfare, using the section 4 checklist as a guide to 'working-out' what might be in a person's best interest. Actions taken in relation to the person's care, treatment or other supports are based on a decision that reflects the person's best interests in the most holistic way possible.

- Knowledge of the Care Act 2014 and the Well-being principle and their application in situations where mental capacity and best interests are in question.
- Knowledge of the section 4 best interests checklist and how it is located with current legislation and policy including, but not limited to: Human Rights Act 1998, Safeguarding Adults, Dignity in Care, Deprivation of Liberty Safeguards 2009, Care Act 2014, Making Safeguarding Personal as they apply to the MCA as appropriate to role and context
- NHS Guidance

#### 5. You must aim to choose the less restrictive option

Any interventions take account of whether there is a less restrictive way of achieving the same purpose with an emphasis on reducing restrictions wherever possible. Any restrictions placed upon a person are considered in terms of whether they are a proportionate response to any restrictions on the person's rights and freedoms, whether direct or indirect (e.g. the result of harm to others). An individual's rights must always be balanced against any risk of harm and any restrictions must be only applied if it is determined to be in a person's best interests.

- Recognise restrictions being placed on an individual and assess whether these are proportionate to the person's needs and risks of harm.
- Attend and contribute to investigations/meetings/information sharing.
- Understand that the MCA exists to empower those who lack capacity as much as it exists to protect them. Professionals must model and lead a change of approach, away from that where the default setting is "safety first", towards a person-centred culture where individual choice is encouraged and where the right of all individuals to express their own lifestyle choices is recognised and valued.
- Know how to identify a deprivation of liberty.
- Understand how to make a request for authorisation to the Local Authority or court where appropriate.
- Understand when an urgent authorisation may be required and work within the organisational policies and procedures and the DoLS code of practice, making a request or providing advice for others to make a request as appropriate to role and context.
- Recognise restrictive care and scrutinise whether it is necessary and proportionate to the risk of harm, challenging restrictive practices where Appropriate

## Evidence level 3

**Professional Roles Covered in this level:** Providing care, treatment, assessment or other intervention – medical, psychological and social, or responsible for commissioning such services.

**Including, but not limited to:** Dementia Nurses, Learning Disability Nurses, Mental Health Nurses, AMHPs, Adult Social Workers (inc MHSW, LDSW), Forensic SW, Psychologists / Other therapists, Psychiatrists (inc s12 Drs). CQC Registered managers in all provider settings

Statutory Competency Principles	Evidence
<b>1. Presume Capacity</b>	
<p>Individuals are able to make their own decisions unless they lack the capacity to do so, which must be proved by the person who is seeking to make the decision on the person's behalf.</p> <p>Capacity should only be assessed if there is a reason to doubt that the person is able to take a particular decision at a specific time; it does not relate to a particular diagnostic label. If there is reason to doubt, then you do have to assess and explain why you are proceeding on the basis of the person's capacitous decision.</p>	<ul style="list-style-type: none"> <li>• detailed knowledge and understanding, including practice experience, of the first principle.</li> <li>• A working knowledge of the capacity assessment process.</li> <li>• Undertake complex capacity assessments and report findings to multi-disciplinary teams, commissioners or managers.</li> </ul>
<b>2. Do all you can to support decision making</b>	
<p>A person must be given all possible help before anyone treats them as not being able to make their own decisions. This means you must make every effort to encourage and support people to make the decision for themselves, for example, treating conditions that may undermine capacity, considering deferring the decision until capacity is improved, ensuring all information is given in a way the person can understand.</p> <p>Communication and engagement skills are essential for anyone working with those affected by difficulties with their ability to make a/some decisions themselves.</p> <p>If lack of capacity is established, it is still important that you involve the person as far as possible in making decisions.</p>	<ul style="list-style-type: none"> <li>• Identify salient information, appropriate assessor, and advice colleagues in staff groups 1-3, as appropriate to role and function, on MCA practice and supported decision making.</li> <li>• Support people to plan for when they may lack capacity in the future, including knowledge of advance decisions, lasting powers of attorney and excluded decisions.</li> <li>• Use highly developed communication and rapport-building skills to help individuals make (or participate in) decisions for themselves.</li> <li>• Recognise, assess and, where appropriate, intervene in situations where coercion is impacting on a person's ability to decide.</li> </ul>

<b>3. Do not conclude someone lacks capacity just because they make an unwise decision</b>	
<p>A person should never be considered to be lacking capacity solely on the basis of a decision or decisions that appear unwise or otherwise not in the person's best interests.</p> <p>People prioritise risk differently, they value different things and are entitled to make decisions that are not only unwise but may also be damaging to their health or welfare if they are able to understand, retain, and weigh up the relevant information in order to make that decision and are able to communicate their decision.</p>	<ul style="list-style-type: none"> <li>• Thorough understanding of positive risk and strengths-based approaches as a means of risk management in cases where individuals with capacity choose to make unwise decisions.</li> <li>• Identify harm and risk of harm, and make appropriate referrals / seek support in order to safeguard adults or children, being aware of issues such as mental capacity and vulnerability</li> </ul>
<b>4. If the person lacks capacity for a decision you must act in their best interest</b>	
<p>Any decision taken on behalf of someone should consider all the factors relevant to them, including their wishes and feelings, the views of others, beliefs and medical, social and emotional welfare, using the section 4 checklist as a guide to 'working-out' what might be in a person's best interest.</p> <p>Actions taken in relation to the person's care, treatment or other supports are based on a decision that reflects the person's best interests in the most holistic way possible</p>	<ul style="list-style-type: none"> <li>• Coordinate consultation and where appropriate chair best interests meetings where appropriate to role and context where it is deemed an independent chair or lead practitioner would be appropriate.</li> </ul>
<b>5. You must aim to choose the less restrictive option</b>	
<p>Any interventions take account of whether there is a less restrictive way of achieving the same purpose with an emphasis on reducing restrictions wherever possible.</p> <p>Any restrictions placed upon a person are considered in terms of whether they are a proportionate response to any restrictions on the person's rights and freedoms, whether direct or indirect (e.g. the result of harm to others).</p> <p>An individual's rights must always be balanced against any risk of harm and any restrictions must be only applied if it is determined to be in a person's best interests.</p>	<ul style="list-style-type: none"> <li>• Recognise where care is restrictive and apply the principles of less and less restriction to assessments and treatment and care decisions.</li> <li>• Review and challenge restrictive practices in care provision and assess restrictions in terms of proportionality to the risk of harm.</li> </ul>

## Evidence Level 4

**Professional Roles Covered in this level:** to provide leadership, management and/or appropriate governance within organisations and ensure organisational policies and procedures are legally compliant and promote best MCA practice.

**Including, but not limited to:** LA DoLS Authorisers, MCA / DoLS leads in LA and NHS organisations, Board and Senior Management MCA / DoLS portfolio holders. General & Physical Health Nurses, General & Physical Health Medical Staff, GPs, Surgical Staff, Dieticians, Physiotherapists, Pharmacists, Radiologists, Dentists and dental nurses, Team managers and Senior Practitioners across Health and Social Care. Hospital Emergency Department,

### Statutory Competency Principles

### Evidence

#### 1. Presume Capacity

Individuals are able to make their own decisions unless they lack the capacity to do so, which must be proved by the person who is seeking to make the decision on the person's behalf.

Capacity should only be assessed if there is a reason to doubt that the person is able to take a particular decision at a specific time; it does not relate to a particular diagnostic label. If there is reason to doubt, then you do have to assess and explain why you are proceeding on the basis of the person's capacitous decision.

- Promote the principle of presumption of capacity within the team and/or organisation as appropriate to role.
- Scrutinise capacity assessments to ensure robustness of process and evidence as impacted by relevant case law and policy updates.
- Ensure organisational policy and practice applies principle 1 within and across the organisation and where relevant multi-agency partners and partnerships.

#### 2. Do all you can to support decision making

A person must be given all possible help before anyone treats them as not being able to make their own decisions. This means you must make every effort to encourage and support people to make the decision for them, for example, treating conditions that may undermine capacity, considering deferring the decision until capacity is improved, ensuring all information is given in a way the person can understand.

Communication and engagement skills are essential for anyone working with those affected by difficulties with their ability to make a/some decisions themselves.

If lack of capacity is established, it is still important that you involve the person as far as possible in making decisions

- Provide leadership in relation to the promotion of supported decision-making, co-production and participation in care, treatment, and where appropriate to role and context, organisational and strategic development.
- Support and develop information and communication skills within the workforce, providing leadership in relation to engagement and relationship building with individuals and families as a means of maximising and supporting a person's ability to make / take part in decisions about them.

### 3. Do not conclude someone lacks capacity just because they make an unwise decision

A person should never be considered to be lacking capacity solely on the basis of a decision or decisions that appear unwise or otherwise not in the person's best interests.

People prioritise risk differently, they value different things and are entitled to make decisions that are not only unwise but may also be damaging to their health or welfare if they are able to understand, retain, and weigh up the relevant information in order to make that decision and are able to communicate their decision.

- Promote a culture of positive risk and risk management within the organisation and/or team, ensuring policy, procedures and practices support staff to take a rights-based approach to decisions and interventions.

### 4. If the person lacks capacity for a decision you must act in their best interest

Any decision taken on behalf of someone should consider all the factors relevant to them, including their wishes and feelings, the views of others, beliefs and medical, social and emotional welfare, using the section 4 checklist as a guide to 'working-out' what might be in a person's best interest.

Actions taken in relation to the person's care, treatment or other supports are based on a decision that reflects the person's best interests in the most holistic way possible

- Chair and lead appropriate meetings and support the multi-disciplinary team in relation to issues mental capacity
- Scrutinise best interests' assessments within DoLS and/or Care Act assessments and apply best practice to decision making as set out in the MCA code and Care Act Statutory Guidance.
- Promote awareness of best interests and the factors that need to be considered, including consultation and recording, and ensure organisational policies and procedures are aligned to the requirements of the MCA to guide staff to work within the appropriate legislative framework.
- Identify and act in situations where a court of protection referral is needed to provide additional safeguards or to scrutinise and mediate complex decisions.
- Recognise the role of the Office of Public Guardian (OPG) and support frontline staff to access the service as appropriate.

### 5. You must aim to choose the less restrictive option

Any interventions take account of whether there is a less restrictive way of achieving the same purpose with an emphasis on reducing restrictions wherever possible.

Any restrictions placed upon a person are considered in terms of whether they are a proportionate response to any restrictions on the person's rights and freedoms, whether direct or indirect (e.g. the result of harm to others).

An individual's rights must always be balanced against any risk of harm and any restrictions must be only applied if it is determined to be in a person's best interests.

- Remain aware and up to date with processes, procedures and case law impacting on the MCA and DoLS practice and cascade these to staff groups as appropriate to role and context.
- Review and challenge restrictions placed on individuals and scrutinise proportionality of restrictions and potential deprivations of liberty.
- Liaise with and instruct solicitors, as appropriate to role, where an individual's rights are being infringed and court of protection intervention is required. Ensuring that the correct local authority are aware (authorising DOLS) e.g. CCG, Local Authority or NHS.

## References:

**NHS Guidance** - <https://www.england.nhs.uk/wp-content/uploads/2014/09/guide-for-clinical-commissioning.pdf>

### **Bexley Safeguarding Adults Board**

Website - [www.BSAB.bexley.gov](http://www.BSAB.bexley.gov)

**Special thanks to: Bournemouth University National Mental Capacity Act Competency Framework-**  
<http://www.ncpgsw.com/financial-scamming-publications/national-mental-capacity-act-competency-framework/>

### **Acts in Connection with Care and Treatment**

Once an assessment of capacity has been made and a best interest decision considered, as per the section 4 checklist, only then can care, treatment, or other social support be given to a person that lacks capacity to make his or her own decision about the matter.

While the general legal principle is that no-one can interfere with an adult's body or property without their consent, section 5 of the MCA provides protection for acts done if the person is established as being mentally incapacitated, and the act (which would normally require consent) is in the person's best interests. The MCA Code of Practice (2007) provides examples of the types of acts that this section covers. These lists are not exhaustive and other care and support activities may also apply.

<b>Capacity Act Code of Practice: Acts in Connection with care and treatment</b>	
<b>In connection with personal care</b>	<b>In connection with treatment</b>
<ul style="list-style-type: none"><li>• Assistance with physical care, e.g. washing, dressing, toileting, changing a catheter, colostomy care</li><li>• Help with eating and drinking</li><li>• Help with mobility or travelling</li><li>• Helping someone with shopping, paying bills or other domestic and household maintenance</li><li>• Helping someone to move home</li><li>• Providing services around the home or in the community</li><li>• • Helping someone to take part in education, social or leisure activities. (see MCA CoP, para 6.5)</li></ul>	<ul style="list-style-type: none"><li>• Administering medication</li><li>• Diabetes injections</li><li>• Diagnostic examinations and tests</li><li>• Medical and dental treatment</li><li>• Nursing care at home or in hospital</li><li>• Taking someone to hospital for assessment or treatment</li><li>• Emergency procedures and care</li><li>• Invasive medical procedures including surgery (see MCA CoP, para 6.5)</li></ul>



## Appendices:

### There are limitations to what section 5 can be used for; these include -

- when the treatment in question is specified in a valid and applicable advance decision to refuse that treatment, and
- where restraint is needed to provide the care and treatment and this is not proportionate to the risk of harm and is not in the person's best interests.

Restraint is defined in the Act in section 6 as -

- the use or threat of force to secure the doing of an act that the individual resists; or
- the restriction of the individual's liberty, whether that individual resists or not.

### Less and Least Restriction

Any restrictions that are imposed on a person need to consider the principle of Less Restriction, i.e. can restrictions that are in place be reduced or minimised in any way while still ensuring the person's wellbeing is safeguarded and risks are managed? Also consideration should be given to the principle of least restriction (as set out in the s4 best interest checklist) i.e. what is the least restrictive option available that protects the person's rights and freedoms. This only applies to restrictions that are necessary to protect the person without capacity from the risk of harm.

Restrictions should not be imposed under the MCA that are for the protection of other people; where this is the case, an alternative framework will be required, e.g. Mental Health Act 1983, criminal justice interventions, etc.

### Coercion and Control

Coercion, with or without accompanying abuse or violence, has been recognised as a significant factor in domestic abuse and adult safeguarding situations. A new offence was created in 2015 by the Serious Crime Act, - 'controlling or coercive behaviour in intimate or familial relationships' (section 76), which closes a gap in the law around patterns of controlling or coercive behaviour in an ongoing relationship between family members or partners.

For more information about the complexities of coercion where capacity is an issue please see the Research in Practice resource focusing on this subject at - <http://coercivecontrol.ripfa.org.uk>

## Safeguarding and Mental Capacity

In situations where a person who may need care and support is actually, or potentially, at risk of harm the Local Authority has a statutory duty to safeguard the person whether they have capacity in relation to the process or not. The MCA also created two criminal offences – ill-treatment and wilful neglect – that can be committed by anyone responsible for the person's care and support (paid and informal supporters). It also makes it clear that while professionals must approach any situation with the presumption of capacity, where there are concerns they may need to consider, for example, whether the person has the capacity to decide about their own situation, or whether they can refuse consent for information to be shared in any safeguarding enquiry.

Where does Deprivation of Liberty and Article 5 fit in?

The European Convention of Human Rights (1950) and the Human Rights Act (1998), which is the Government's interpretation of the convention within UK Law, governs the relationship between the state and its citizens.

Human rights are universal and apply to us all. Some of our rights are 'absolute', for example in England and Wales, the right to protection from torture and inhumane and degrading treatment (Article 3). Others are 'qualified', meaning that the state can interfere with them if there is a 'procedure prescribed by law' to authorise it. Deprivation of a person's liberty is one of these qualified rights and is set out in Article 5 of both the Human Rights Act 1998 and the European Convention, which state –

- Article 5 (1). Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save ... in accordance with a procedure prescribed by law.
- Article 5 (4). Everyone who is deprived of his liberty ... shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The Deprivation of Liberty Safeguards (DoLS) were added to the MCA by the Mental Health Act 2007. This means that DoLS is part of the MCA and, as such, is underpinned by the same processes and considerations as those for mental capacity more generally; crucially this includes the core principles of the MCA.

### Section 42, Care Act 2014

A Section 42 enquiry must take place if there is reason to believe that abuse or neglect is taking place, or is at risk of taking place, and the local authority believes that an enquiry is needed to help it to decide what action to take to support and protect the person in question.

Within the context of 'Making Safeguarding Personal', the particular circumstances of each individual will determine the scope of each enquiry, as well as who leads it and the form it takes.

## Care Act 2014

The Care Act 2014 creates a legal framework for how local authorities and other parts of the system should work together to protect adults at risk of abuse or neglect. The Act requires the local authority to make enquiries, or to ask others to make enquiries, where they reasonably suspect that an adult in its area is at risk of neglect or abuse.

The statutory guidance to the Care Act 2014 also outlines a number of fundamental principles that must now underpin the practices of a range of public service organisations in relation to adult safeguarding and mental capacity; these include the importance of:

1. Promoting wellbeing when providing support or making a decision in relation to a person.
2. Beginning with the assumption that the individual is best placed to make judgments about their own wellbeing.
3. Taking into account any particular views, feelings or beliefs (including religious beliefs) which impact on the choices that a person may wish to make about their support. This is especially important where a person has expressed views in the past but no longer has capacity to make decisions themselves.
4. A preventive approach because wellbeing cannot be achieved through crisis management. By providing effective intervention at the right time, risk factors may be prevented from escalating.
5. Ensuring the person is able to participate as fully as possible in decisions about them and being given the information and support necessary to consider options and make decisions rather than decisions being made from which the person is excluded.
6. Considering the person in the context of their family and wider support networks, taking into account the impact of an individual's need on those who support them, and take steps to help others access information or support.
7. Protecting the person from abuse and neglect and, in carrying out any care and support functions, professionals consider how to ensure that the person is and remains protected from abuse or neglect. This is not confined only to safeguarding issues, but should be a general principle applied in every case.
8. Ensuring that any restriction on the person's rights or freedom of action is kept to the minimum necessary. Where action has to be taken which restrict these, the course followed balances both the person's best interests and the principle of less restriction.

## Relationship to Other Relevant/Related Frameworks

These competencies are designed to build on existing professional standards and requirements across the full range of delivery and professional settings. Where directly relevant these have been cross-referenced and/or incorporated in the relevant staff group, these include:

- Knowledge and Skills Statement for Adult Social Workers (DH, 2014)
- National Safeguarding Adults Competence Framework (BU, 2016)
- Best Interests Assessor Capabilities (TCSW, 2014)
- Professional Capabilities Framework (PCF) (TCSW, 2012, updated BASW, 2015).
- Forensic Social Work Capability Framework (DH, 2016)
- PACE Code of Practice C (MoJ, 2012)



# **Authored by Bexley Safeguarding Adults Board**

*Helping adults to live a life free from abuse or neglect*

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