Policy on Mental Capacity

This policy is based on The Hertfordshire MCA Policy and adapted for use within West Hertfordshire Hospitals NHS Trust

Equality Impact Assessment

The Trust is committed to promoting an environment that values diversity. All staff are responsible for ensuring that all patients and their carers are treated equally and fairly and not discriminated against on the grounds of race, sex, disability, religion, age and sexual orientation or any other unjustifiable reason in the application of this Policy, and recognizing the need to work in partnership with and seek Guidance from other agencies and services to ensure that special needs are met.
### Glossary

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Glossary

MCA
Mental Capacity Act 2005

IMCA
Independent Mental Capacity Advocacy

Decision Maker
A professional who consults with others to decide on the best interest decision

Code of Practice
Written to support the understanding and application of the MCA

Where no one else appropriate is available to consult
The term is used when a person who lacks capacity to make specific decisions, has nobody else who is willing and able to represent them or be consulted in the process of working out their best interests

Best Interests
Under the Act, many different people may be required to make decisions or act on behalf of someone who lacks capacity to make decisions for themselves. The person making the decision is referred to as the ‘decision maker’. It is the decision maker’s responsibility to work out what would be in the best interests of the person who lacks capacity. The Act does not define the term “best interest”, however, section 4 of the Act (supported by the Code of Practice) sets down how to decide what is in the best interests of a person who lacks capacity in any particular situation

Lasting Power of a Attorney (LPA)
This is a Power of Attorney created by the MCA 2005, appointing an attorney to make decisions about decisions in relation to personal welfare, including healthcare and/or deal with property and affairs
1 Introduction

The Mental Capacity Act 2005 (MCA) applies to care, treatment and support of people 16 years and over, in England and Wales, who are unable to make all or some decisions for themselves. The Act is accompanied by a statutory Code of Practice, which explains how the MCA will work on a day-to-day basis, and provides guidance to all those working with, or caring for, people who lack capacity. As the Code has statutory force, certain categories of people have a legal duty to have regard to it when working with or caring for adults who may lack capacity to make decisions for themselves e.g.

- An attorney under a Lasting Power of Attorney
- A deputy appointed by the new Court of Protection
- An individual acting as an IMCA
- Any person carrying out research approved in accordance with the MCA
- Any person acting in a professional capacity for, or on relation to, a person who lacks capacity
- Any person being paid for acts in relation to a person who lacks capacity

In April 2007 the new Independent Mental Capacity Advocate service (IMCAs) became operational, and the new Criminal Offence of Ill Treatment or Wilful Neglect came into force.

From October 2007 all other parts of the Act came into force.

The Code of Practice to support the act is available and staff working with people who lack capacity are required to have regard to the Code (MCA Code of Practice 2005).

http://www.justice.gov.uk/guidance/mental-capacity.htm

1.1 Purpose of this Policy

This Policy sets out the requirements for all Hertfordshire Health and Social Care staff in respect of the Mental Capacity Act 2005, which came into full force from October 2007, and the accompanying Code of Practice. Legislation requires that all staff who are employed in Health and Social Care are required to 'have regard' to the Code of Practice.

The Code of Practice must be referenced and used by all staff. It can be found at www.justice.gov.uk/guidance/mental-capacity.htm. There are also hard copies of the Code on Acute Wards within the Trust. This Policy sets out the framework for Hertfordshire health and social care staff for the assessment of mental capacity and the tasks associated with working with individuals when they do not have capacity. It provides the broad outline of the MCA; detailed guidance should be sought from the MCA Code of Practice.

1.2 Policy

All staff employed in Hertfordshire within Health and Social Care who work directly with patients must have regard for the Mental Capacity Act 2005 and the Code of Practice. www.justice.gov.uk/guidance/mental-capacity.htm

2 Mental Capacity

2.1 Definition of Mental Capacity

The MCA in Part 1, section 1, defines FIVE principles, which apply throughout the MCA:

- A person must be assumed to have capacity unless it is established that he lacks capacity
- A person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success
A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

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

Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.

These Principles must be considered and followed in every instance when consideration is being given to using the MCA.

2.2 Definition of lack of capacity

Section 2 of the MCA then sets down the test of capacity. The test is made up of 2 stages and is expressed in the MCA in the following terms:-

"For the purpose of the Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."

The Section also makes clear that:

- It does not matter whether the impairment or disturbance is permanent or temporary
- A lack of capacity cannot be established merely by reference to:
  - a person’s age or appearance
  - or a condition of his
  - or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity

Stage 1:
There must be an impairment of, or disturbance in the functioning of, the mind or brain.

Stage 2:
As a result of the impairment of, or disturbance in the functioning of, the mind or brain there must be an inability to make the decision in question.

Refer to Chapter 4 of the Code of Practice for more details.

www.justice.gov.uk/guidance/mental-capacity.htm

In Section 3, the Act then defines inability to make decisions:

A person is unable to make a decision for himself if he is unable:

- To understand the information relevant to the decision
- To retain that information
- To use or weigh that information as part of the process of making a decision or
- To communicate his decision (whether by talking, using sign language or any other means)

Staff must refer to and follow the Act and Chapter 4 of the accompanying Code of Practice for the detail. This is to ensure the recording demonstrates the process of Mental Capacity Assessment in accordance with the act and includes the patient in the assessment process.

www.justice.gov.uk/guidance/mental-capacity.htm
2.3 When to assess capacity

There should always be the assumption that a person has capacity to make the decision in question. In addition every patient must be assisted/facilitated to make the decision in question. If there is evidence to suggest that a person may lack capacity then an assessment of capacity should be carried out.

2.4 Fluctuating capacity

Some people may at times be able to make their own decisions, but have a mental health problem or other condition, which affects their decision-making ability. Where there is fluctuating or temporary loss of capacity, an assessment of capacity has to be made at the time the decision has to be made. If it is possible, the decision should be delayed until the person has recovered and regained their capacity. If an individual has been assessed as not having capacity to make a specific decision, this must be reviewed based on new decisions to be made and any progress the individual has made.

Refer to the Code of Practice Chapter 4 for more detail. [www.justice.gov.uk/guidance/mental-capacity.htm](http://www.justice.gov.uk/guidance/mental-capacity.htm)

3. The Assessment of Capacity

Anyone caring for or supporting a person who may lack capacity could be involved in the test to assess capacity. The more significant the decision, the greater the number of people likely to be involved. Who is involved will depend on individual circumstances. Specialist or expert opinion may be helpful, but knowledge of the person concerned, for example that of their family or friends is very important.

The presumption is always that a person has capacity to make a decision. Deciding that a person lacks capacity is a serious decision. A formal, clear and recorded process should follow when an important decision is to be made and recorded on the Assessment of Capacity Form (Appendix 1) and Best Interest Form (Appendix 2).

A Flow Chart has been developed to assist with the decision making process (Appendix 3).

Day to day assessments of capacity may be relatively informal but should still be written down in the patient’s records, a Capacity Assessment (Appendix 4) and Best Interest Prompt Sheet (Appendix 5) has been designed to assist staff in this process.

3.1 Test of capacity

The MCA sets out the test for capacity in section 2. Detail of how to carry out an assessment of capacity can be found in the Code of Practice Chapter 4. Staff must follow this test of capacity to record their assessment relating to Proposed Change of Accommodation or Serious Medical Treatment on the Assessment of Capacity Form (Appendix 1).

3.2 Challenge to the finding of a lack of capacity

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

The Assessor will need to make use of the information recorded on the capacity assessment form to explain why a particular decision has been made and so they must give reasons why they believe that the patient lacks capacity to make the specific decision and provide objective evidence to support this.
The Assessor must also demonstrate that they have applied the principles of the Mental Capacity Act and followed the Code of Practice.

In some situations it may be helpful to obtain a second opinion from another professional who has not been involved in the patient's care. Where there is still disagreement then the Assessor's Line Manager must discuss with their Line Manager, who will seek further advice if needed. Ultimately it may be necessary to refer the matter to the Court of Protection for a decision.

Refer to the Code of Practice Chapter 15 for more guidance on how to settle disagreements and disputes.

www.justice.gov.uk/guidance/mental-capacity.htm

4. Best Interests

If a person has been assessed as lacking capacity, then any action taken, or decisions made for, or on behalf of that person must be made in his or her best interests.

The Act provides a checklist when determining what is in an individual's best interests.

It is important that the person making the decision should not make assumptions based on the person's age or appearance, or a condition of his or an aspect of his behaviour which might lead others to make unjustified assumptions about what might be in his best interests.

You must:

- Consider whether it is likely that the person will at some time have capacity in relation to the matter in question, and if it appears likely that he will, when that is likely to be
- So far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him
- Not, where the determination relates to life-sustaining treatment you, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death

You must consider, so far as is reasonably ascertainable:

- The person's past and present wishes and feelings (and in particular, any relevant written statement made by him when he had capacity)
- The beliefs and values that would be likely to influence his decision if he had capacity, and
- The other factors that he would be likely to consider if he were able to do so

You must take into account, if it is practicable and appropriate to consult them as to what would be in the person's best interests, the views of:

- Anyone named by the person as someone to be consulted on the matter in question or on matters of that kind
- Anyone engaged in caring for the person or interested in his welfare
- Any donee of a Lasting Power of Attorney granted by the person, and
- Any deputy appointed for the person by the court

Refer to Chapter 5 of the Code of Practice for more detail.

www.justice.gov.uk/guidance/mental-capacity.htm
5. **Who is the Decision Maker?**

The person who has to make the decision on behalf of the person lacking capacity is known as the decision maker. This will normally be the person responsible for the day-to-day care. Where a decision needs to be made about care arrangements, this could be the Care Manager, where the decision is about treatment this could be the Doctor or Nurse. A best interest decision must be recorded on the Best Interest Form (Appendix 2).

6. **What Decisions Cannot be Made on Behalf of Another?**

The following decisions cannot be made by the decision maker:

- Consenting to marriage or civil partnership
- Consenting to sexual relations
- Consenting to divorce or dissolution of civil partnerships on 2 years separation
- Consenting to a placement of a child for adoption by an adoption agency
- Consenting to the making of an adoption order
- The discharge of parental responsibilities not relating to a child’s property
- Consenting to anything under the Human Fertilisation and Embryology Act
- Voting in any election or referendum

Refer to Chapter 1 of the Code of Practice. [www.justice.gov.uk/guidance/mental-capacity.htm](http://www.justice.gov.uk/guidance/mental-capacity.htm)

7. **Use of the Independent Mental Capacity Independent Advocate (IMCA)**

7.1 When a person lacks capacity and has nobody else who is appropriate and able to represent them or be consulted in the process of working out their best interests, an IMCA is appointed to provide this support. The IMCA makes representations about the person’s wishes, feelings, beliefs, and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision. The IMCA can challenge the decision-maker on behalf of the person lacking capacity, if necessary.

The key functions of the IMCA are:

- Representing and supporting the person who lacks capacity
- Obtaining and evaluating information
- Ascertaining the person’s wishes and feelings, as far as possible
- Ascertaining alternative courses of action
- Obtaining a further medical opinion

[www.justice.gov.uk/guidance/mental-capacity.htm](http://www.justice.gov.uk/guidance/mental-capacity.htm)

7.2 **When to Refer**

The decision maker has the **duty** to instruct the IMCA before making the decision (except in an emergency), in the following circumstances:

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

**AND** the person without capacity **has nobody else who is willing and appropriate** to represent them or be consulted in the process of working out their best interests.

For these decisions all local authorities and all health bodies **must** refer to an IMCA for anyone who lacks capacity and qualifies for the IMCA service.
7.3 **Moves within Health Resources**

Where a person moves to another bed within a health resource as part of their current episode of care there will not need to be a referral to an IMCA regarding this move.

If the person is moved to another health resource for rehabilitation and it is planned that this episode of care will exceed 28 days an IMCA may need to be instructed.

7.4 **Additional Decisions**

There are two further decisions where the local authority or health care provider has the power to instruct an IMCA for a person who lacks capacity. These are decisions relating to:

- Care reviews and
- Adult protection cases

In these cases the local authority or the NHS body has a duty to decide in each individual case whether it would be of particular benefit to the person who lacks capacity to have an IMCA support them. Criteria has been developed to help identify who would benefit from an IMCA in these two decisions.

7.5 **Involvement of an IMCA in Care Reviews and Adult Protection**

The Regulations made under the Mental Capacity Act specify that Local Authorities and the NHS have powers to instruct an IMCA if the following are met:

- Where protective measures are being put in place in relation to the protection of vulnerable adults from abuse; and
- Where the person lacks capacity

In these circumstances the LA or NHS body may instruct an IMCA to represent the person concerned if it is satisfied that it would be of benefit to the person to do so. Although there is discretion to appoint an IMCA in these cases, there is a duty on every occasion to decide whether or not such an appointment is necessary.

All Adult Protection Strategy meetings should consider if a referral should be made to an IMCA, using the criteria in 7.6.

The regulations do not require the person in an adult protection situation to have no friends or family to consult. The regulations apply equally to:

- A person who has been abused
- Who has been neglected and
- A person who is the alleged abuser

7.6 **Hertfordshire Criteria to Identify Service Users who May Benefit by the Involvement of an IMCA in Adult Protection Cases.**

The alleged victim must have been assessed to not have capacity to make decisions in relation to the issues that have been identified at the Adult Protection Strategy meeting and there is one or more of the following factors:

- There is a high risk that further abuse or neglect will occur
- There is conflict between family and the decision maker
- The alleged perpetrator lives with the service user
The alleged perpetrator is a vulnerable person. The alleged perpetrator must have been assessed to not have capacity to make decisions in relation to the issues that have been identified at the adult protection strategy meeting and there is one or more of the following factors:

- There is a high risk that further abuse or neglect will occur
- There is conflict between family and the decision maker

7.7 Involvement of an IMCA in Care Reviews

The regulations made under the Act specify that local authorities and the NHS have the power to instruct an IMCA in accommodation reviews if the following three requirements are met. The LA or the NHS must have arranged the original accommodation; and the person whose accommodation is being reviewed must lack capacity: and there is no other appropriate person willing and able to be consulted.

Accommodation review is defined as the review of care needs for residents in a care home or placed in NHS funded care.

In these circumstances the LA or NHS body may instruct an IMCA to represent the person concerned if it is satisfied that it would be of particular benefit to the person to do so.

7.8 Although there is discretion to appoint an IMCA in these cases, there is a duty on every occasion to decide whether or not such an appointment is necessary.

7.9 Hertfordshire criteria to identify service users who may benefit by the involvement of an IMCA in a care review.

The person must have been assessed to not have capacity to make decisions about where they reside and how their care is provided, the placement was arranged by the LA or by the NHS and there is no other appropriate person willing and able to be consulted and there is one or more of the following factors:

- An IMCA was involved in the initial placement
- An IMCA would have been involved but this was an emergency placement
- The person did not have capacity when placed in the accommodation, prior to the implementation of the Mental Capacity Act in April 2007
- The person has lost capacity since being placed in accommodation
- There is disagreement between agencies and/or care provider on how best the person’s needs can be met in the future

If staff are uncertain about the need for an IMCA, they should consult first with their line manager, who will seek further advice if needed from Adult Care Services.

8. Recording

Staff must record on the capacity assessment form (Appendix 1), the decision whether or not to involve an IMCA and the reasons.

You are required to record the process followed in making a best interest decision on the Hertfordshire Best Interest form, (Appendix 2).

Refer to Section 5 of the Code of Practice for more detail.

[www.justice.gov.uk/guidance/mental-capacity.htm](http://www.justice.gov.uk/guidance/mental-capacity.htm)
9. **Access to a Service User’s Records by Others**

Detailed guidance on confidentiality can be found in Chapter 4 and 16 of the Code of Practice.

If there has been a referral to an IMCA, then the IMCA will be able to access relevant records under section 35(6)(b) of the MCA. This gives the IMCA the right to examine, and take copies of any records that **the person holding the record thinks are relevant to the investigation**. This is likely to include clinical records, care plans, social care assessments documentation or care home records.

It will be appropriate for the decision maker to meet with the IMCA to agree the information to be seen. If the IMCA is requesting third party information, advice should be sought from the person responsible for access to records requests.

10. **How to Contact the IMCA Service in Hertfordshire**

POhWER provides the IMCA service for Hertfordshire. If you want to make a referral or want more information they can be reached at Tel 0845 223 0436. More information on the IMCA service and referral forms can be found at [www.pohwer.net](http://www.pohwer.net). Please see Flow Chart, Appendix 6, which outlines the decision making, and referral process.

11. **Disagreement by the IMCA with the Decision Maker**

An IMCA has the same rights to challenge a decision as any one else involved in caring for or interested in the welfare of, the service user.

At first the IMCA should discuss with the decision maker the areas they disagree about, and try to seek resolution. There should be involvement of the decision maker’s line manager and the IMCA’s Line Manager to try and determine a way forward. If this is not possible then the issues should be referred to the IMCA steering group through the POhWER representative on this group.

12. **New Criminal Offence**

The Mental Capacity Act introduces new criminal offences: that of ill-treating or wilfully neglecting a person who lacks capacity to make relevant decisions. The offences may apply to:

- Anyone caring for a person who lacks capacity- this includes family carers, health care and social care staff in Hospital or Care Homes and those providing care in a person’s home
- An attorney appointed under a Lasting Power of Attorney or an Enduring Power of Attorney, or
- A deputy appointed for the person by the court. See Chapter 14 of the Code of Practice for further information [www.justice.gov.uk/guidance/mental-capacity.htm](http://www.justice.gov.uk/guidance/mental-capacity.htm)

13. **Protection for Staff Providing Care or Treatment**

The MCA provides legal protection from liability for carrying out certain actions in connection with the care and treatment of people who lack capacity to consent, provided that before taking the action you take reasonable steps to establish whether the person lacks capacity to the matter in question. When carrying out the assessment you reasonably believe the person lacks capacity and that it would be in their best interests for the act to be done. The Code of Practice provides useful detail on the type of work routinely undertaken by staff in health and social care, there is also specific reference to use of restraint.

Reference Chapter 6 in the Code of Practice. [www.justice.gov.uk/guidance/mental-capacity.htm](http://www.justice.gov.uk/guidance/mental-capacity.htm)
14. **Lasting Powers of Attorney**

The MCA provides a new form of power of attorney; these are Lasting Powers of Attorney (LPAs). People over the age of 18 will be able to formally appoint one or more people to look after their personal welfare, and/or their property affairs. They allow individuals to plan ahead for a time when they may not have capacity to make certain decisions.

The person making the LPA is known in legal terms as the donor, and the power they are giving to another person is the lasting power of attorney. The person appointed is then called an attorney. The LPA gives the attorney the authority to make decisions on the donor’s behalf.

The attorney will have a duty to act or make decisions in the donor’s best interests.

If a person has a LPA then an IMCA would not be appointed.

Attorneys acting under an LPA have a legal duty to have regard to the guidance in the Code of Practice and act in the individual’s best interest.

Details on the LPAs, how they are arranged and their powers can be found in the Code of Practice Chapter 7.

Details of the application forms and supporting documents can be found at [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk)

Referral can also be made to the Trusts Policy on Advanced Statements Concerning Medical Treatments.

15. **Certification of the LPA**

Staff may be approached by individuals that they are working with to help support them in the process of completing the LPA form or to certify the form.

Staff are not required to do this as part of their contract of employment. They should explain that they cannot do this and that those wanting support with the LPA process should seek advice from a solicitor or from the local Citizens Advice Bureau.

If staff are approached outside their work, then they will need to be mindful of the requirements of their professional registering body.

16. **Enduring Powers of Attorney (EPA)**

These only cover property and affairs, and remain valid. However, from October 2007, new EPA’s cannot be drawn up. Details of the law and procedures covering EPA’s can be found at the Office of the Public Guardian. [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk)

17. **Role of the Court of Protection and Court Appointed Deputies**

17.1 **Court of Protection**

Section 45 of the Act establishes the specialist court that will deal with matters relating to decision making of adults and some children who may lack the capacity to make specific decisions. This court is known as the Court of Protection. This new Court of Protection extends its previous role in decisions about property and affairs to serious decisions about health and personal welfare.
The Court of Protection has powers to:

- Make declaration about whether or not a person has capacity to make a particular decision
- Make decision on serious issues about health care and treatment
- Make decisions about the property and financial affairs of a person who lacks capacity
- Appoint deputies to have an ongoing authority to make decisions
- Make decisions in relation to LPAs and EPAs

17.2 Court Appointed Deputies

Deputies replace the current court appointed receivers for property and affairs, and now the Court will also be able to appoint deputies for personal welfare decisions. Deputies should have regard to the Code of Practice and act in the person's best interests.

17.3 Local Authorities as Deputy

Local Authorities have regularly been appointed by the Court of Protection as receiver, now they could be appointed as a deputy, when there is no one else who could act on behalf of the person lacking capacity to manage their financial affairs. This may now be extended to include personal welfare decisions.

Where the Local Authority is appointed as deputy, staff working with the person who lacks capacity in those matters will need to ensure that the individual is still involved in the decision making process. This should be clearly documented in the case notes and in the case of significant decisions on the best interest form.

17.4 Conflict of Interest

The local authority will need to satisfy itself that there is no conflict of interest in exercising the duties of deputy. Financial management of an individual’s monies through the Local Authority deputy comes under the Finance section, and is audited.

Decisions made by the Local Authority as the deputy for personal welfare should demonstrate that the best interests of the individual have been identified and that the needs are met.

The care plan should be sent to the Head of Social Care Practice to ensure that this is documented.

LA deputies are supervised by the Public Guardianship Office.

17.5 Court of Protection Visitors

A Court of Protection Visitor provides independent advice to the Court and the Public Guardian. There are two types of visitors, General Visitors and Special Visitors. Special Visitors are Registered Medical Practitioners with relevant expertise.

17.6 The Public Guardian and the Office of the Public Guardian

The Public Guardian supported by the staff in the Office of the Public Guardian help protect people who lack capacity by:

- Setting up and managing a register of EPAs and LPAs
- Setting up and managing a register of court orders that appoint deputies
- Supervision of deputies
- Sending out Court of Protection Visitors
- Providing reports to the Court of Protection
- Dealing with complaints about attorneys or deputies
18. **Advance Decisions to Refuse Treatment**

An advance decision enables someone aged 18 and over to set out what particular types of treatment they would **not** want to have and in what circumstances, should they lack the capacity to consent to or refuse this treatment in the future. Staff should record on the patient's record if they are aware of the existence of an advance decision and where this is kept. The MCA sets out what is required in law for an advance decision to be **valid** and **applicable**.

Details can be found in Chapter 9 of the Code of Practice.

19. **Research**

The MCA sets out the rules for research that involves people who lack the capacity to consent.

Details can be found in Chapter 11 of the Code of Practice. [www.justice.gov.uk/guidance/mental-capacity.htm](http://www.justice.gov.uk/guidance/mental-capacity.htm)

20. **Children and Young People**

Details of how the MCA applies to children aged below 16 and young people aged 16 -17 and the overlap between the MCA and the Children Act, can be found in the Code of Practice Chapter 12. [www.justice.gov.uk/guidance/mental-capacity.htm](http://www.justice.gov.uk/guidance/mental-capacity.htm)

21. **Relationship between MCA and the Mental Health Act (MHA)**

Before any application under the MHA, decision makers should consider if they could achieve their aims by using the MCA instead.

Details of the interface between the MHA and the MCA can be found in Chapter 13 of the Code of Practice. [www.justice.gov.uk/guidance/mental-capacity.htm](http://www.justice.gov.uk/guidance/mental-capacity.htm)

22. **Settling Disputes and Disagreement**

Disputes between the IMCA and the decision maker see point 11.

It is important that disagreements are settled before they become serious disputes. Emphasis should be on early resolution, to try and prevent the need for referral to the Court of Protection.

Staff should involve their line manager at an early stage. Legal advice may need to be sought. Service users and their families may make use of the appropriate Health Trust or social care complaints procedure.

The Code of Practice offers some practical advice, see Chapter 15. [www.justice.gov.uk/guidance/mental-capacity.htm](http://www.justice.gov.uk/guidance/mental-capacity.htm)

23. **Access to Information**


Personal information should not be disclosed unless:

- The person agrees
- There is a legal obligation to do so
- There is an overriding public interest
Where the person lacks capacity, the MCA test of ‘best interests’ may also justify disclosure. Only as much information as necessary should be divulged.

If there has been a referral to an IMCA, then the IMCA will be able to access relevant records under section 35(6)(b) of the MCA. This gives the IMCA the right to examine, and take copies of any records that the person holding the record thinks are relevant to the investigation. This is likely to include clinical records, care plans, social care assessment documentation or care home records.

It will be appropriate for the decision maker to meet with the IMCA to agree the information to be seen. If the IMCA is requesting third party information, advice should be sought from the person responsible for access requests.

24. Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards, which relate to people who lack capacity and who are being and may be deprived of their liberty has been agreed by Parliament and will come into effect from April 2009. A more detailed Operational Policy will be available on the Trust Intranet prior to April 2009.

25. Training and Education

From January 2009 Mental Capacity Act Training will be Mandatory for all Trust staff. An e-learning programme has been developed for all staff within Hertfordshire; Trust staff can access this programme at http://www.kwango.com/hccmcallogin

26. Monitoring Compliance

To monitor compliance of this Policy, snapshot audits will be undertaken six monthly. Compliance will also be monitored as part of the Bi-annual Essence of Care Record Keeping Benchmarking Audit.

References

All can be found at www.justice.gov.uk/guidance/mental-capacity.htm, (username - WHACUTE, password – MCAWNACC)
Mental Capacity Code of Practice (2005)
Making Decisions; A guide for people who work in health and social care
The Mental Health Act (2005)

Sources of Further Information

Booklet 1 Making decisions about your health, welfare or finance
Booklet 2 Making decisions. A guide for family, friends and other unpaid carers
Booklet 3 Making Decisions; A guide for people who work in health and social care
Booklet 4 Making decisions. A guide for advice workers
Booklet 5 Making decisions. An easy read guide

All of the above can be found at http://www.justice.gov.uk/guidance/mental-capacity.htm

Office of the Public Guardian http://www.publicguardian.gov.uk

Information on existing tests of capacity e.g. to make a will or get married can be found in:
Assessment of Mental Capacity Second Edition
Hertfordshire Policy on Mental Capacity Issue 2 ACS 765 21 of 20, Ann Norway (October 2007)
### APPENDIX 1

**ASSESSMENT OF CAPACITY**

Reference must be made to the Mental Capacity Act 2005, Sections 1 and 2, and the Code of Practice Chapter 4, in order to complete this assessment.

<table>
<thead>
<tr>
<th>Name of Patient:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hospital Number:</td>
</tr>
<tr>
<td>Address:</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>1</th>
<th>What factors are present, which indicate an assessment of capacity should be carried out?</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>2</th>
<th>What practical steps have been taken to help the person make the decision?</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>3</th>
<th>What is the focus of the assessment, what decision needs to be made?</th>
</tr>
</thead>
</table>

| 4 | Fluctuating capacity, does the decision have to be made now? Can it wait? |
|   | Evidence                                                             |

| 5 | Have you explained the purpose of the assessment? |
|   | Evidence                                           |

<p>| 6 | Has the patient understood the information relevant to the decision? |</p>
<table>
<thead>
<tr>
<th>Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
</tr>
<tr>
<td>8</td>
</tr>
<tr>
<td>9</td>
</tr>
<tr>
<td>10</td>
</tr>
<tr>
<td>11</td>
</tr>
<tr>
<td>12</td>
</tr>
</tbody>
</table>

Name of assessor (print): 
Job Title: 
Date of assessment: Time of assessment

Reference Mental Capacity Act 2005, Code of Practice
### APPENDIX 2

**BEST INTEREST DECISION**

To be completed if an assessment of capacity has identified that the person does not have the capacity to decide on a specific issue. Reference must be made to the Mental Capacity Act 2005, section 4 and to the Code of Practice in order to make a Best Interest Decision.

<table>
<thead>
<tr>
<th>Name of Patient:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hospital Number:</td>
</tr>
<tr>
<td>Address:</td>
</tr>
</tbody>
</table>

1. **What is the decision that needs to be made?**

2. **Is the patient likely to regain capacity?**
   - Yes [ ]
   - No [ ]

   If yes, can the decision wait?
   **If it can wait, then the decision should wait until the person regains capacity.**

3. **What arrangements have you made to ensure that as far as practicable the person is helped to participate as fully as possible in the decision-making?**
<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>What are the person’s past and present wishes? Is there an advance decision? Is it valid and applicable to the decision?</td>
</tr>
<tr>
<td>5</td>
<td>What are the person’s beliefs and values that would be likely to influence their decision?</td>
</tr>
<tr>
<td>6</td>
<td>What other factors would they consider?</td>
</tr>
<tr>
<td>7</td>
<td>What are the views of significant others, including IMCA, identify those consulted and their relationship.</td>
</tr>
<tr>
<td>8</td>
<td>Set out the decision made and the reasoning behind the decision, why this decision would be in the patient’s best interests.</td>
</tr>
</tbody>
</table>

Name:  
Job Title:  
Date of decision:  
Time of decision  
Reference Mental Capacity Act 2005, Code of Practice
Flow chart for assessment of Mental Capacity and Best Interest Decision Making

DOES THE PATIENT HAVE CAPACITY TO MAKE PARTICULAR DECISION AT PARTICULAR TIME

YES

Can the decision wait until the patient has capacity?

YES

NO / don't know

NO / don't know

Obtain/Facilitate patient to provide consent voluntarily, ensuring information is provided at a level appropriate to the patient. Document in the patient's health care records.

Undertake the two stage mental capacity assessment using Prompt Sheet (Appendix 4) and fully document in patient records (or for serious medical issues complete form Appendix 1)

YES

Does the patient have capacity?

NO

Use Best Interest Checklist Prompt Sheet (Appendix 5) to make decision based on the least restricted option – involve carers, close family and fully document in-patient records (or for serious medical issues use form Appendix 2) Consider need for IMCA

www.pohwer.net
## APPENDIX 4  ASSESSMENT OF CAPACITY PROMPT SHEET

Reference must be made to the Mental Capacity Act 2005, Sections 1 and 2, and the Code of Practice Chapter 4, in order to complete this assessment. Remember assessment of mental capacity must be decision specific. Copies of the code are available on each ward or can be downloaded from [http://www.justice.gov.uk/guidance/mental-capacity.htm](http://www.justice.gov.uk/guidance/mental-capacity.htm)

This prompt sheet is NOT meant to be THE RECORD of the discussion, merely a series of prompts for documenting evidence that an appropriate decision about a patient’s decision-making capacity has been reached.

This may be challenged in a Court of Law

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Is there concern that the patient does not have capacity to make a decision?</td>
</tr>
<tr>
<td></td>
<td><strong>Can the decision wait until patient regains capacity</strong></td>
</tr>
<tr>
<td>2</td>
<td>What decision needs to be made?</td>
</tr>
<tr>
<td></td>
<td><strong>Evidence of this needs to be documented in the patient records or on the Mental Capacity Assessment Form Appendix 1</strong></td>
</tr>
<tr>
<td>3</td>
<td><strong>First part of Assessment</strong></td>
</tr>
<tr>
<td></td>
<td>Does the patient have an impairment of, or disturbance in the functioning of, the mind or brain? – If yes undertake second part of Assessment</td>
</tr>
<tr>
<td>4</td>
<td><strong>Second part of Assessment</strong></td>
</tr>
<tr>
<td></td>
<td>Does the patient understand the information related to the decision?</td>
</tr>
<tr>
<td></td>
<td><strong>Evidence of this needs to be documented in the patient records or on the Mental Capacity Assessment Form Appendix 1</strong></td>
</tr>
<tr>
<td>5</td>
<td>Can the patient retain the information related to the decision?</td>
</tr>
<tr>
<td></td>
<td><strong>Evidence of this needs to be documented in the patient records or on the Mental Capacity Assessment Form Appendix 1</strong></td>
</tr>
<tr>
<td>6</td>
<td>Can the patient use or weigh the information as part of the decision making process?</td>
</tr>
<tr>
<td></td>
<td><strong>Evidence of this needs to be documented in the patient records or on the Mental Capacity Assessment Form Appendix 1</strong></td>
</tr>
<tr>
<td>7</td>
<td>Can the patient communicate their decision whether by talking, using sign language or other means?</td>
</tr>
<tr>
<td></td>
<td><strong>Evidence of this needs to be documented in the patient records or on the Mental Capacity Assessment Form Appendix 1</strong></td>
</tr>
<tr>
<td>8</td>
<td>If the patient does not have capacity, they cannot consent, therefore, decisions must be made in their best interests and the decision recorded on the Best Interests Decision Form Appendix 5</td>
</tr>
<tr>
<td></td>
<td><strong>Do they require the involvement of an Independent Mental Capacity Advisor (IMCA) for decisions related to Proposed Change of Accommodation or Serious Medical Treatment? Referral process can be found at <a href="http://www.pohwer.net">www.pohwer.net</a></strong></td>
</tr>
</tbody>
</table>


### APPENDIX 5

**BEST INTEREST DECISION PROMPT SHEET**

To be completed if an assessment of capacity has identified that the person does not have capacity to decide on a specific issue. Reference must be made to the Mental Capacity Act 2005, section 4 and to the code of Practice in order to make a Best Interest Decision. Copies of the code are available on each ward or can be downloaded from [http://www.justice.gov.uk/guidance/mental-capacity.htm](http://www.justice.gov.uk/guidance/mental-capacity.htm)

This prompt sheet is **NOT** meant to be **THE RECORD** of the decision made in the patient’s best interest, merely a series of prompts for documenting evidence that an appropriate decision has been made in the patients best interest and is the least restrictive option.

The prompts are based on the statutory legal checklist. This may be challenged in a Court of Law.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Avoid making assumption about someone’s best interests merely on the basis of the person’s age, appearance, condition or behaviour</td>
</tr>
<tr>
<td>2</td>
<td>What arrangements have you made to ensure that as far as practicable the person is helped to participate as fully as possible in the decision-making?</td>
</tr>
<tr>
<td></td>
<td><strong>Evidence of this needs to be documented in the patient records or on the Best Interest form appendix 2</strong></td>
</tr>
<tr>
<td>3</td>
<td>Consider a person’s own wishes, feelings, beliefs and values and any written statements made by the person when they had capacity.</td>
</tr>
<tr>
<td></td>
<td><strong>Evidence of this needs to be documented in the patient records or on the Best Interest form appendix 2</strong></td>
</tr>
<tr>
<td>4</td>
<td>Is there an advance decision?</td>
</tr>
<tr>
<td></td>
<td>Is it valid and applicable to the decision?</td>
</tr>
<tr>
<td></td>
<td><strong>Evidence of this needs to be documented in the patient records or on the Best Interest form appendix 2</strong></td>
</tr>
<tr>
<td>5</td>
<td>Can the decision be put off until the person regains capacity?</td>
</tr>
<tr>
<td></td>
<td><strong>Evidence of this needs to be documented in the patient records or on the Best Interest form appendix 2</strong></td>
</tr>
<tr>
<td>6</td>
<td>What are the views of significant others family, informal carers, IMCA, identify those consulted and their relationship.</td>
</tr>
<tr>
<td></td>
<td><strong>Evidence of this needs to be documented in the patient records or on the Best Interest form appendix 2</strong></td>
</tr>
<tr>
<td>7</td>
<td>Demonstrate that you have carefully assessed any conflicting evidence or views.</td>
</tr>
<tr>
<td></td>
<td><strong>Evidence of this needs to be documented in the patient records or on the Best Interest form appendix 2</strong></td>
</tr>
<tr>
<td>8</td>
<td>Involve the patient in the decision making process</td>
</tr>
<tr>
<td>9</td>
<td>Set out the decision made and the reasoning behind the decision, why this decision would be in the patient’s best interests? Take the less restrictive alternative or intervention.</td>
</tr>
<tr>
<td></td>
<td><strong>Evidence of this needs to be documented in the patient records or on the Best Interest form appendix 2</strong></td>
</tr>
</tbody>
</table>