

# **The Newcastle upon Tyne Hospitals NHS Foundation Trust**

## **The Mental Capacity Act 2005 Policy Including the Deprivation of Liberty Amendment 2009**

Effective: March 2009

Review: March 2012

### **1. Introduction**

The Mental Capacity Act 2005 (MCA) came into effect on the 1<sup>st</sup> April 2007 and has been amended to include procedures for authorising the deprivation of liberty in hospitals and care homes of some people who lack capacity to consent to being there. It provides a statutory framework to empower and protect any adult over the age of 16 who may not be able to make their own decisions.

A lack of mental capacity maybe due to

- Brain Injury or Stroke
- Dementia
- Learning Disability
- Mental Health Problems
- Substance Misuse
- Confusional States, drowsiness or unconsciousness because of an illness or the treatment for it.

The MCA enables people to plan ahead for a time when they may lose capacity. Guidance on the Act is provided in a Code of Practice which is available on the Clinical Governance Website. All Health and Social Care Professionals working with people who lack capacity have a legal duty to have regard to the Code of Practice.

### **2. Principles**

The MCA is underpinned by a set of 5 key principles.  
They are:-

- i. A presumption of capacity.

Every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless proven otherwise.

- ii. The right for individuals to be supported to make their own decisions.

People must be given all appropriate help before anyone concludes that they cannot make their own decisions. There is also the right of individuals to make, what might be seen as, eccentric or unwise decisions.

iii. Best interests.

Anything done for or on behalf of people without capacity must be in their best interests.

iv. Least restricted intervention.

Any thing done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

### **3. Provision of the Act**

#### **3.1 Assessment of capacity**

The Act sets out a single clear test for assessing whether a person lacks capacity to take a particular decision at a particular time. It is decision specific i.e. no one can be labelled incapable as a result of a particular medical condition or diagnosis. The MCA makes it clear that a lack of capacity cannot be established merely by reference to a person's age, appearance, or any condition or aspect of a person's behaviour which might lead to an unjustified assumption about their capacity.

#### **3.2 Best Interests**

Everything that is done for or on behalf of, a person who lacks capacity must be in that person's best interests. The MCA provides a checklist of factors that decision makers must work through and decide what is in the person's best interests. A person can put his/her wishes and feelings into a written statement if they so wish, which must be considered by the decision maker. Carers and family members also have the right to be consulted when decisions are being made about a patient who lacks capacity.

#### **3.3 Acts in connection with care or treatment**

Where a person is providing care or treatment for someone who lacks capacity, then that person can provide the care without incurring legal liability. The key to this will be the proper assessment of capacity and best interests. This will cover actions that would otherwise result in the civil wrong or crime if someone has to interfere with the patient's body or property in the ordinary course of caring e.g. by giving an injection.

#### **3.4 Restraint and deprivation of liberty**

The Act defines restraint as any restriction of liberty or movement and/or the use of threats of force when an incapacitated person resists. Restraint is only permitted if the person using it reasonably believes it is necessary to prevent

harm (whether to the person concerned or to another person) and the restraint used is proportionate to the likelihood and seriousness of that harm. Depriving a person of his or her liberty is still subject to the meaning of article 5 (1) of the European Convention on Human Rights. The MCA has been amended to allow legal deprivation of liberty which is discussed under section ten of this Policy.

### 3.5. Advanced Decisions to refuse treatment

The MCA provides clear safeguards that allow people to make a decision in advance to refuse treatment if they should lose capacity in the future. The management of the Advanced Decision is discussed in the Trust's Policy for Advance Decisions (Living Wills / Advanced Refusal of Treatment) Incorporating the Mental Capacity Act 2005.

### 3.6 A criminal offence

The MCA introduces a new criminal offence of ill treatment or neglect of a person who lacks capacity. A person found guilty of such an offence may be liable to imprisonment for up to 5 years.

### 3.7 Research

The MCA sets out parameters for research which may be lawfully carried out if an "appropriate body" (normally a Research Ethics Committee) agrees it is safe, relates to the person's condition, and produces a benefit to the person that outweighs risk, or burden. Carers or nominated third parties must be consulted and agree. If the person shows any signs of resistance or indicates in any way that they did not want to take part they must be withdrawn from the research project.

## **4. Roles and Responsibilities**

4.1 Clinical Directors will be responsible for the implementation of the MCA within their areas of responsibility. All consultants will act as decision makers and provide guidance to staff within their teams.

4.2 Directorate Managers and Matrons will be responsible for providing support and advice to other staff on the implementation of the policy within their directorate.

4.3 The Adult Safeguarding team will be responsible for providing guidance, advice, support and training to staff within the Trust.

4.4 Ward and Departmental Managers are responsible for the local implementation of this policy and on advising nursing and other staff in the processes to be followed.

4.5 All staff must ensure compliance with this policy at all times.

## **5 Decision Makers**

The decision maker is determined by the nature and complexity of the decision to be made. Day to day care decisions may be made by a paid or unpaid carer. Complex health, social care, finance and accommodation decisions must be made by Health and Social Care professionals. Doctors are the decision makers for Medical Decisions.

### **5.1 Designated Decision Makers**

Where care is led primarily by another profession the senior member of the team dealing with the patient at that time will be classed as the decision maker for that patient. Thus, where care is provided and led by a nurse consultant the designated decision maker will be the nurse consultant, where basic nursing care is being provided the Registered Nurse responsible for the patient will be the designated decision maker. Where occupational or physiotherapy services are being used the professional dealing with the patient at the time of the intervention will be the designated decision maker.

5.2 Where a decision is required to identify the most appropriate discharge destination, to a non NHS commissioned service, the social worker will be the designated decision maker.

## **6. Lasting Power of Attorney (LPA)**

The MCA allows a person to appoint two separate types of attorney to act on their behalf if they should lose capacity in the future. This includes the existing finance attorney, to be known as a property and affairs LPA and a new health and welfare LPA who will be able to make health and welfare decisions (including giving or refusing consent to treatment) further advice on this issue can be found in the Trust's Policy on Lasting Power of Attorney and Court of Protection.

## **7. Court of Protection appointed Deputies**

7.1 The new Court of Protection will have jurisdiction relating to the whole MCA and will be the final arbitrator for capacity matters. It will have its own procedures and nominated judges. The MCA provides for a system of courts of protection, and to appoint deputies to replace the current system of receivership. Deputies will be able to consider decisions on welfare, healthcare and financial matters as authorised by the court (but will not be able to refuse consent for life sustaining treatment). They will only be appointed, if the court cannot make a decision to resolve the issues. Deputies appointed to make financial decisions cannot make health or welfare decisions.

7.2 The MCA creates a new Public Guardian. The Public Guardian and his/her staff will be the registered authority for LPA's and deputies. They will supervise

deputies appointed by the court and provide information to help the court make decisions. They will also work together with other agencies such as the police and social services, to respond to any concerns raised about the way an attorney or deputy is operating.

## **8. Independent Mental Capacity Advocate (IMCA)**

An IMCA must be appointed to support a person who lacks capacity and has no family or friends to consult. This will occur if:-

- It is proposed that the person needs serious medical treatment provided by the NHS. Emergency treatment however, can be carried out without waiting for the appointment or involvement of an IMCA. For further information see the Trust's Policy for Consent to Examination or Treatment Incorporating the Mental Capacity Act 2005
- It is proposed that the person remains in hospital for more than 28 days
- It is proposed that the person is moved into long term care for more than 8 weeks
- It is proposed that the person is to be moved (for more than 8 weeks) to different accommodation such as a hospital or a care home.

An IMCA may also be appointed in cases of adult protection and care reviews. The IMCA makes representations about the person's wishes, feelings, beliefs and values, looking at all factors that are relevant to the decision. If necessary, the IMCA can challenge the decision maker on behalf of the person lacking capacity.

## **9. Capacity**

### **9.1 Presumption of Capacity**

The Act presumes that every person has capacity to make a decision, unless they have been assessed as unable to make it. Trust staff should make every effort to encourage and support the person to make the decision himself or herself.

This means reviewing whether:

- The person has all relevant available information
- The information could be explained or presented in another way that is easier to understand (e.g. photographs, videos, sign language, or pictures)
- The person has the necessary aids e.g. hearing aid or spectacles

- There is a time of day or place which enhances the persons understanding
- Someone else can help or support the person to understand the information or make the choice e.g. an interpreter.

## 9.2 Assessing a persons capacity

Under the MCA, capacity is 'decision specific'. This requires staff to assess a person's capacity to make a particular decision at a particular time by applying a functional two part test. The first part should determine whether there is an impairment of or a disturbance in the functioning of the person's mind or brain.

If the patient has a mental disturbance or impairment, the second part of the test is to determine whether the impairment or disturbance makes the person unable to make the particular decision. The following should be considered:

- Is the patient able to understanding information
- Is the patient able to retain information long enough to make a decision
- Is the patient capable of applying judgement to the information available thereby supporting decision making
- Is the patient able to communicate their decision, this can be by talking, sign language or even blinking or squeezing hands.

The person would be deemed as having capacity if all four elements of the above can be achieved.

## 9.3 Assessing best interests

Any action taken or decisions made on behalf of someone lacking capacity must be made in his or her best interests. The Act refers to a checklist of key factors for the decision maker to consider when determining what is in the person's best interest. This includes consideration of:

- Whether the person is likely to regain capacity and if so whether the decision can wait until that time
- The relevant circumstances relating to the decision in question
- The person's past and present wishes and feelings
- Any belief and values (religious, cultural, or moral) that might influence the decision

- The views of other people such as carers, close friends or close relatives, anyone else interested in the person's welfare, any attorney appointed under LPA or any deputy appointed by the court of protection to make decisions for that person.

When the patient has no one but paid carers and lacks capacity, the decision maker **must** involve an IMCA for:

- decisions about serious medical treatment
- cases when the patient is expected to reside in hospital for more than 28 days
- decisions and arrangements relating to long term changes of accommodation.

**Please see appendix 1&2 for Capacity Assessment and Best Interest Assessment forms**

MCA Code of Practice is available at:

<http://www.publicguardian.gov.uk/docs/mca-code-practice-0509.pdf>

## **10. Deprivation of Liberty**

### 10.1 Background

The Mental Health Act 2007 (MHA) amended the Mental Capacity Act 2005 (MCA) to allow for the deprivation of liberty for those subjects that do not require the rigorous standards applied for compulsory admission under the MHA. The Amendment came into force on the 1<sup>st</sup> April 2009.

It is recognised that some people lack the capacity to consent to particular treatments or care that is in their best interests, or which will protect them from harm. Where this care might involve depriving vulnerable people of their liberty extra safeguards have been introduced through this amendment to protect their rights and to ensure that the care or treatment that they receive is in their best interests. Where it is felt that an individual's liberty may be deprived, a formal 'deprivation of liberty assessment' must be carried out. This assessment will be requested by the 'managing organisation' i.e. the Trust, and the 'supervising authority' i.e. the PCT or local authority will arrange for the assessment to be undertaken.

The European Court of Human Rights made a distinction between the deprivation of liberty of an individual, which is unlawful unless authorised, and restriction of liberty which can be classed as lawful if carried out in the person's best interests when they lack capacity. This is based on Section 5 of the Human Rights Act 1998. The court does not define what deprivation of liberty is, however, it does describe situations which could **cumulatively** amount to a deprivation of liberty. They are:

- Restraint is used, including sedation, to admit a patient to a hospital when the patient is resisting admission
- Staff exercise complete and effective control over the care and movement of the patient for a significant period, this would include the use of sedation to prevent them leaving
- Staff exercise control over assessments, treatment, contacts and residence
- Request by carers for the patient to be discharged into their care is refused
- The patient is unable to maintain social contact because of restrictions placed on their access to other people
- The person loses autonomy because they are under continuous supervision and control.

Examples of court cases leading to deprivation of liberty can be found in the Deprivation of Liberty Code of Conduct which is available on the Clinical Governance and Risk Website on the Trust's intranet.

## 10.2 Process

To ensure that staff are acting legally a strict procedure must be followed when it is thought that a patient may be suffering a deprivation of liberty. This procedure is explained in detail in the Trust's Procedure for the Deprivation of Liberty of Patient under the Mental Capacity Act 2007.

Having decided that a deprivation of liberty situation may be developing the consultant in charge of the case must apply to the PCT for assessments to take place.

The PCT will then arrange for six assessments to be carried out on the patient and the care situation, to see whether the proposed course of action is correct and in the best interests of the patient.

The Assessments are:

- Age Assessment
- Mental Health Assessment
- Mental Capacity Assessment
- Eligibility Assessment
- No refusals Assessment
- Best Interest Assessment.

Should these assessments identify that the proposed action is in the patient's best interest, permission will be granted for the patient's liberty to be deprived for a prescribed length of time.

As part of the Best Interest Assessment, the assessor will identify a 'representative' who will be empowered to act for the patient. This representative will normally be a relative or close friend and they will also have access to the services of an IMCA who will have the professional expertise to deal with the complexities of the relevant Acts.

MCA DOL Code of Practice is available at [http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_087309.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_087309.pdf)

## **11. Disputes**

If there is a dispute about capacity or best interest one or more of the following actions may be required:

- a second opinion from a senior clinician
- an informal or formal multi agency case conference
- mediation
- application to the court of protection for a ruling
- involvement an independent advocate
- referral to an IMCA.

Advice must initially be sought from the Trust's Adult Safeguarding Team who may involve the Trust's solicitor.

## **12. Records**

As part of the assessment processes, Assessors and IMCAs will have access to the patient's records. The assessment processes will be aided by well maintained clinical documentation. Completing the required forms and records also enables the Trust to demonstrate that staff acted lawfully if their actions are later challenged. This includes demonstrating that decisions were based on all available evidence and take into account the views of all relevant people, having regard to the five key principles of the MCA.

## **13 Training**

Training on the MCA will be provided by the Adult Safeguarding Team.

## **14. Review and monitoring**

The content of this policy will be reviewed every three years. Adherence to the policy will be monitored by the Clinical Governance and Quality Committee. The Clinical Governance and Quality Committee will receive a six monthly summary report from the safeguarding team relating to Deprivation of Liberty Assessment applications.

Author: Mental Capacity Act/Deprivation of Liberty Lead, Safeguarding Team

Patient's name  
 Dob.  
 Hospital No:  
 (Affix sticker)

**Mental Capacity Act 2005**

**FORM MCA1**

Record of a Mental Capacity Assessment

Guidance: you are completing this form because you are uncertain if the person identified below has the mental capacity to make a particular decision or that you have information that has led you to believe this person does not have the mental capacity to make a particular decision.

<b>Name of patient:</b>	
<b>Name of Assessor:</b>	
<b>Date assessment started and time:</b>	
<b>Please give the name and status of anyone who assisted with this assessment:</b>	
<b>Name</b>	<b>Status</b>

**Description Of The Decision To Be Made By Patient In Relation To Their Care Or Treatment:**

**STAGE 1 - DETERMINING IMPAIRMENT OR DISTURBANCE OF MIND OR BRAIN**

**Guidance:** every adult should be assumed to have the capacity to make a decision unless it is proved that they lack capacity. An assumption about someone's capacity cannot be made merely on the basis of a patient's age or appearance, condition or aspect of his or her behaviour.

	Response		Comments
	Yes	No	
<p><b>Q1.</b> Is there an impairment of, or disturbance in the functioning of the patient's mind or brain? (For example, symptoms of alcohol or drug use, delirium, concussion following head injury, conditions associated with some forms of mental illness, dementia, significant learning disability, long term effects of brain damage, confusion, drowsiness or loss of consciousness due to a physical or medical condition)</p>			<i>Please detail:</i>

If you have answered **YES** to Question 1, **PROCEED TO STAGE 2**

If you have answered **NO** to the above, there is no such impairment or disturbance and thus THE PATIENT CANNOT LACK CAPACITY within the meaning of the Mental Capacity Act 2005. Sign/date this form, record the outcome within the patient records and **PROCEED NO FURTHER WITH THIS RECORD OF ASSESSMENT OF CAPACITY**

**STAGE 2 - ASSESSMENT**

**Having determined impairment or disturbance (Stage 1) and given consideration to the ease, location and timing; relevance of information communicated; the communication method used; and others involvement, you now need to complete your assessment and form your opinion as to whether the impairment or disturbance is sufficient that the patient lacks the capacity to make this particular decision at this moment in time.**

	Response		Comments
	Yes	No	
<p><b>Q2.</b> Do you consider the patient <b>able</b> to understand the information relevant to the decision and that this information has been provided in a way that the service user is most probably able to understand?</p>			
<p><b>Q3.</b> Do you consider the patient <b>able</b> to retain the information for long enough to use it in order to make a choice or an effective decision?</p>			
<p><b>Q4.</b> Do you consider the patient <b>able</b> to use or weigh that information as part of the process of making the decision?</p>			
<p><b>Q5.</b> Do you consider the patient <b>able</b> to communicate their decision? (by any means, please explain)</p>			

If you have answered **YES** consistently to Q2 to Q5, the patient is considered on the balance of probability, **to have the capacity to make this particular decision at this time.** Sign/date this form and record the outcome within the Service User records and **PROCEED NO FURTHER WITH THIS CAPACITY ASSESSMENT.**

<b>If you have answered NO to any of the questions, proceed to Q6.</b>			
<b>Q6.</b> Overall, do you consider on the balance of probability, that the impairment or disturbance as identified in STAGE 1, is sufficient that the patient lacks the capacity to make this particular decision?		<i>On the balance of probability, the patient Lacks Capacity to make this decision at this particular time. Sign and date this form and proceed to consider 'Best Interests'</i>	
<b>Signature:</b>		<b>Date &amp; time assessment completed</b>	

Patient's name:  
Dob:  
Hospital No:  
(Affix sticker)

**Mental Capacity Act 2005****FORM MCA2****Record of actions taken to make a best interest decision**

1. Is there a valid advanced decision to refuse treatment?
2. Is there an applicable lasting power of attorney for patient welfare?

<b>Name of patient:</b>		
<b>Name of Decision Making Officer:</b>		
<b>Date best interest decision making process started:</b>		
<b>Please give the name and status of anyone who assisted with making this best interest decision:</b>		
<b>Name</b>	<b>Status</b>	
<b>Description of the decision to be made regarding the patient (in relation to their care or treatment):</b>		
<b>PART 1 DETERMINING LACK OF CAPACITY</b>		
Every adult should be assumed to have the capacity to make a decision unless it is proved that they lack capacity. An assumption about someone's capacity cannot be made merely on the basis of a patient's age or appearance, condition or aspect of his or her behaviour.		
	<b>Response</b>	
	<b>Yes</b>	<b>No</b>
Has the patient been determined as lacking capacity to make this particular decision at this moment in time?		
<i>Guidance: give date of capacity assessment (form MCA1)</i>		
If you have answered <b>YES</b> , <b>PROCEED TO PART 2</b> of this document.		
If you have answered <b>NO</b> , identify decision(s) to be made and complete capacity assessment.		

**PART 2 – DETERMINING BEST INTERESTS**

**All steps and decisions taken for someone who lacks capacity must be taken in the their best interests.**

		Comments you must fill in narrative	
<p><b>Q1. Avoid Discrimination – Guidance</b> Have you avoided making assumptions merely on the basis of the patient’s age, appearance, condition or behaviour?</p>			
<p><b>Q2. Relevant Circumstances – Guidance:</b> Have you identified all the things the patient’s would have taken into account when making the decision for themselves?</p>			
<p><b>Q3. Regaining Capacity – Guidance:</b> Have you considered if the patient’s is likely to have capacity at some date in the future and if the decision can be delayed until that time?</p>			
<p><b>Q4. Encourage Participation – Guidance:</b> Have you done whatever is possible to permit and encourage the patient’s to take part in making the decision?</p>			
<p><b>Q5. Special Considerations – Guidance:</b> Where the decision relates to life sustaining treatment, have you ensured that the decision has not been motivated in any way, by a desire to bring about their death?</p>			
<p><b>Q6. The Persons Wishes – Guidance:</b> Has consideration been given to the patient’s past and present wishes and feelings, beliefs and values, that would be likely to influence this decision?</p>			
<p><b>Q7. Written statements – Guidance:</b> Have you considered any written statement made by the person when they had capacity? E.g. ADRT</p>			
<p><b>Q8. Consult Others – Guidance:</b> Have you where practicable and appropriate, consulted and taken into account the views of others including those engaged in caring for the patient, relatives and friends, persons previously named by the Service User, Attorney under a Lasting or Enduring Power of Attorney or Deputy of the Court of Protection? <b>Other Considerations – Guidance:</b> have you considered factors such as emotional bonds, family obligations that the person would be likely to consider if they were making the decision?</p>			
<p><b>Q9. IMCA – Guidance:</b> If the decision relates to serious medical treatment or changes to accommodation and there is no one identified in Q8, you must consider instructing an Independent Mental Capacity Advocate and receive a report from an IMCA. See IMCA referral document for relevant guidance regarding referral to the IMCA service</p>			
<p><b>Q10. Avoid Restricting Rights – Guidance:</b> Has consideration been given to the least restrictive option for the patient?</p>			
<p><b>Q11.</b> Having considered all the relevant circumstances, what decision/action do you intend to take whilst acting in the Best Interests of the patient?</p>			
<p><b>Signature:</b></p>		<p><b>Date:</b></p>	

**THE NEWCASTLE UPON TYNE HOSPITALS NHS FOUNDATION TRUST  
IMPACT ASSESSMENT – SCREENING FORM A**

This form must be completed and attached to any procedural document when submitted to the appropriate committee for consideration and approval.

Policy Title:	The Mental Capacity Act 2005 Policy Including the Deprivation of Liberty Amendment 2009	Policy Author:	Diane Palmer
		Yes/No?	You must provide evidence to support your response:
1.	Does the policy/guidance affect one group less or more favourably than another on the basis of:		
	• Race	No	
	• Ethnic origins (including gypsies and travellers)	No	
	• Nationality	No	
	• Gender	No	
	• Culture	No	
	• Religion or belief	No	
	• Sexual orientation including lesbian, gay and bisexual people	No	
	• Age	No	The purpose of the policy is to support and protect patients who lack capacity. Which may be due to age or mental disability
	• Disability – learning difficulties, physical disability, sensory impairment and mental health problems.	No	
2.	Is there any evidence that some groups are affected differently?	No	
3.	If you have identified potential discrimination, are any exceptions valid, legal and/or justifiable?	No	Point is made to include interpretation services if required
4(a).	Is the impact of the policy/guidance likely to be negative? <i>(If "yes", please answer sections 4(b) to 4(d)).</i>	No	
4(b).	If so can the impact be avoided?		
4(c).	What alternatives are there to achieving the policy/guidance without the impact?		
4(d)	Can we reduce the impact by taking different action?		
<b>Comments:</b>		<b>Action Plan due (or Not Applicable):</b>	
		Not applicable	

Name and Designation of Person responsible for completion of this form: Kingsley Straker Mental Capacity Act/Deprivation of Liberty Lead Safeguarding Team

Names & Designations of those involved in the impact assessment screening process: Safeguarding Team 10/08/2011

(If any reader of this procedural document identifies a potential discriminatory impact that has not been identified on this form, please refer to the Policy Author identified above, together with any suggestions for the actions required to avoid/reduce this impact.)