Kent and Medway
NHS and Social Care Partnership Trust

Mental Capacity Act
Policy and Guidelines

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DOCUMENT TRACKING SHEET

Mental Capacity Act Policy and Guidelines

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0.1	Draft	24/04/09		*Copyright not agreed work in progress*
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3.0	Approved	3/01/17	Patient Experience Group	Ratified
3.1	Approved	March 2018	Policy Manager	Separated the Equality Impact Assessment from the document.. Amended 'service lines' to 'care groups'. Updated intranet links.
3.2	Draft	September 2019	Safeguarding Adults MCA/DOLs Lead	Rewrite
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5.0	Final	06/07/2023	Trust Wide Patient Safety and Mortality Review Group	Approved
6.0	Final	September 2023	Trust Wide Patient Safety and Mortality Review Group	Approved

REFERENCES

Mental Capacity Act Code of Practice 2005
Mental Health Act Code of Practice 2015
Mental Capacity Act Prompt Cards, NHS England
Deprivation of Liberty Safeguards Code of Practice
European Convention of Human Rights Act
The Code -Professional Standards of Practice and Behaviour for Nurses and Midwives. NMC 2015
Standard forms and record keeping guide for managing authorities. Dept of Health 2009

RELATED POLICIES/PROCEDURES/protocols/forms/leaflets

Consent to Treatment Policy	KMPT.CliG.049
Informal Patients Policy	KMPT.CliG.022

Advanced Care Planning Guidelines	KMPT.CliG.133
CPA Policy	KMPT.CliG.001
ECT Policy	KMPT.CliG.070
Medicines Management Policy	KMPT.CliG.008
Search Policy	KMPT.CliG.138
Admission & Discharge Policy Older Peoples Service	KMPT.CliG.083
Intimate Care Policy	KMPT.CliG. 015
Locked Door Policy In-patient Wards	KMPT.CliG.107
Safeguarding adults policy	KMPT.CliG.006.06

SUMMARY OF CHANGES

Date	Author	Page	Changes (brief summary)
Nov 16			• The Deprivation of Liberty (DoLS) section of this policy has been removed as it will now be a separate policy. • MCA document should now be recorded in the MCA section on Rio or other uploaded MCA documentation linked to the Rio MCA section. • Assessment documentation from MCA page available on MCA Staffzone removed from appendix. • References Informal Admission Agreement. • This policy now expects compliance with the MCA rather than just awareness of the Act.
Jul 23			In line with case law MCA 2 stage test has been revised New flow chart added reflecting revised two stage test Addition of guidance on preparing for assessment

CONTENTS

1 POLICY STATEMENT

1.1 The Mental Capacity Act (2005) provides a statutory framework for people who lack capacity to make decisions, or who have capacity and want to make preparations for a time when they may lack capacity in the future. This policy will support KMPT staff to understand and apply the Mental Capacity Act (2005) and associated Code of Practice for the assessment of Mental Capacity.

1.2 It is anticipated that Mental Capacity Act (2005) practice will change relative to developments in case law. Therefore, this policy should be read in conjunction with any Mental Capacity Act Guidance Notes and Documentation, which will be posted by the MCA Lead on the Kent & Medway NHS Partnership Trust website and issued to Service Managers as deemed appropriate to keep all staff aware of amendments to practice.

1.3 The Mental Capacity Act (2005) will be referred to MCA here on.

2 BACKGROUND

2.1 The MCA 2005 was introduced in England and Wales in April 2007. It sets out who can make decisions, in which situations, and how they should go about it. It applies to all those involved in providing health and social care and is supported by a Code of Practice 2007 which gives guidance on its implementation and outlines statutory obligations. These obligations apply to doctors, nurses, allied health professionals and care staff. The Code of Practice can be found here. This policy has not been designed to reproduce or replace the Code of Practice.

2.2 The Mental Capacity Act's starting point is that it should be assumed that an adult (aged 16 or over) has full legal capacity to make decisions for themselves (the right to autonomy) unless it can be shown that they lack capacity to make a decision for themselves at the time the decision needs to be made. This is known as the presumption of capacity. The Act also states that people must be given all appropriate help and support to enable them to make their own decisions or to maximise their participation in any decision-making process.

2.3 The Act sets out how capacity should be assessed and procedures for making decisions on behalf of people who lack mental capacity. 'The underlying philosophy of the MCA is that any decision made, or action taken, on behalf of someone who lacks the capacity to make the decision or act for themselves must be made in their best interests'

2.4 The Mental Capacity Act (2005) outlines:

- Who can make decisions for people who lack capacity?
- In which situations this can be done
- How they should go about this

3 SCOPE

3.1 The aim of this policy is to ensure that all KMPT staff promote the welfare of adults in ensuring the principles of the MCA are embedded into practice. We aim to do this

by ensuring that we comply with the MCA Code of Practice and upholding the rights of adults with care and support needs ensuring it is integral to all we do.

3.2 KMPT is committed to implementing this policy and the practices it sets out. KMPT will offer learning opportunities and make provision for appropriate MCA training to all staff and will also ensure the MCA Code of Practice is available to all staff.

3.3 This policy addresses the responsibilities of KMPT employees;

3.4 The Trust expects all staff to follow the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves. KMPT expects all staff working with or caring for an adult who may lack capacity to make decisions which comply with the Mental Capacity Act (2005) when making decisions or acting for that person. Deprivation of Liberty Safeguards which are also part of the MCA are addressed in a separate policy.

4 BREACHES OF POLICY AND DUTIES

4.1 Staff who, fail to follow the Code of Practice may risk prosecution. A person found guilty of such an offence may be liable to imprisonment for a term of up to five years

4.2 This policy is for information and application by all Kent & Medway NHS Partnership Trust staff in respect of all service users receiving care and treatment within the organisation.

5 PRINCIPLES

5.1 KMPT staff should recognise the responsibility to ensure adherence to the MCA and to support adults who are not able to make their own decisions, to support them to plan ahead, if they wish for a time when they may lose capacity. The MCA is intended to assist and support people who may lack capacity and to discourage anyone who is involved in caring for someone who lacks capacity from being overly restrictive or controlling. The Act also aims to balance an individual's right to make decisions for themselves, with their right to be protected from harm if they lack capacity to make decisions to protect themselves.

5.2 Joint working and effective collaboration is essential to promote the rights and freedom of individuals. This is supported by:

- The commitment of all staff and clear lines of accountability by staff to comply with the principles of the MCA and the Code of Practice. This will protects them from liability.
- Practice developments that take account of the need for staff training and continuing professional development, so that staff have an understanding of their roles and responsibilities and those of other professionals and organisations in relation to MCA.
- Building confidence among staff regarding how and when to assess and individual's mental capacity, and how to make a best interests decision when necessary.

6 WHAT IS MENTAL CAPACITY?

6.1 Having mental capacity means that the person has the ability to make their own decisions by weighing up relevant information. All staff should always start from the assumption that the person has the capacity to make the decision in question (**principle 1**).

6.2 Staff must also be able to show that they have made every effort to encourage and support the person to make the decision themselves (**principle 2**).

6.3 Staff must also remember that if a person makes a decision which is considered unwise, this does not necessarily mean that the person lacks the capacity to make the decision (**principle 3**).

6.4 Under the MCA, staff are required to make an assessment of capacity before carrying out any care or treatment if they have reasonable belief someone lacks capacity – the more significant the decision, for example change of residence, the more formal the assessment of capacity needs to be.

7 THE FIVE STATUTORY PRINCIPLES OF THE MCA

1. A person must be assumed to have capacity unless it is established that they lack capacity.

2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

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

5. 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 as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

8 WHEN SHOULD CAPACITY BE ASSESSED?

8.1 Capacity should be assessed when a person's mental capacity to consent to their treatment or care is in doubt. Capacity is **decision and time specific**, assessing capacity refers to assessing a person's ability to make a particular decision at a particular moment in time, rather than being an overarching judgement about an individual's ability to make decisions in general. Staff cannot decide that someone lacks capacity based upon age, appearance, condition or behavior alone.

8.2 The MCA 2005 defines lack of capacity as follows:

"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".

8.3 The Act assumes that a person has capacity until it is proven otherwise.

8.4 Capacity may be called into question for a number of reasons including:

8.4.1 An individual's behavior or circumstances.

8.4.2 Where concern about capacity has been raised by someone.

8.4.3 Where a person has been previously diagnosed with an impairment or disturbance that affects the way their mind or brain works.

8.4.4 A previous mental capacity assessment has shown lack of capacity to make a decision.

8.5 Further information can be found in Appendix A in the checklist and Appendix B for practitioners applying the MCA.

9 CONSENT AND CAPACITY

9.1 You must have reasonable belief that the individual lacks mental capacity to have legal protection under the MCA 2005 for making decisions on a person's behalf. To have reasonable belief, you must take certain steps to establish that the person lacks mental capacity to make a decision or consent to an act at the time the decision or consent is needed.

9.2 You must establish and be able to show that the decision or act is in the person's best interests. A mental capacity assessment must be completed using the two and four stage tests outlined in sec 10 below.

9.3 A mental capacity assessment helps demonstrate that on a balance of probabilities it is more likely than not, that the person lacks capacity. You should be able to show in your records why you have come to your conclusion that capacity is either present or lacking for the particular decision.

9.4 Not all decisions will need a formal mental capacity assessment and the outcome can be recorded within the service user records and care plan. The person's care plan will cover many day to day decisions, but there will be times when a formal mental capacity assessment should be undertaken. Formal mental capacity assessments to assess the mental capacity for an individual to make a particular decision at a particular time should be kept in the patient care records.

9.5 Examples of when to undertake a formal capacity assessment include, but are not exclusive to:

- Use of bed rails
- Use of restraint
- Any invasive procedures
- Covert medication
- Any procedures where the resident is handled for the provision of care and treatment
- Medical photography

9.6 If the decision to be made is complex or may have serious consequences or, if there is disagreement about a person's capacity, or a safeguarding issue, then there may

be times when you need to involve other professionals and colleagues in carrying out a mental capacity assessment and/or best interest's decision.

9.7 Occasionally an individual may object to having a mental capacity assessment. Where this happens it is good practice to explain what the mental capacity assessment is and how it will help to protect their rights. There should be no undue pressure for the person to have the assessment, as a person has the right to refuse.

9.8 If it is clear that the person lacks the mental capacity to consent to the assessment and there are concerns or risks about the person's care and treatment then the assessment can usually go ahead as long the assessment is in the person's best interests.

9.9 The Mental Capacity Act Code of Practice gives the following guidance regarding the assessment of capacity relating to any matter requiring consent to a course of action or any other type of decision

- Does the person have a general understanding of what the decision is and why they are being asked to make it?
- Does the person have a general understanding of the consequences of Making, or not making, this decision?
- Is the person able to understand, retain and weigh up the information relevant to the decision, and use it as part of the process of arriving at a decision?

10 THE TWO STAGE TEST TO ASSESS MENTAL CAPACITY

STAGE 1 FUNCTIONAL TEST: The functional test consists of 4 elements, each of which you must test the person's ability in. They are:

a. The ability to understand information about the decision (the 'relevant' information);
b. The ability to retain the information long enough to make the decision;
c. The ability to use, or 'weigh up' the information as part of the decision making process; and
d. The ability to communicate their decision through any means.

In order to make their own decision the person must be able to demonstrate their ability in *all* of the areas of the functional test. If the person is able to demonstrate ability in all areas, Stage 2 of the test does not need to be completed and they should be deemed to have capacity to make the decision.

11 PREPARING TO CARRY OUT THE FUNCTIONAL TEST

The following are all steps that you should take before you carry out the functional test of capacity:

a. Make sure that you understand the nature of the decision to be made;
b. Make sure you understand the range of options available;
c. Make sure you consider and prepare the information that may be relevant to the decision;
d. Establish whether there is a donee of a Lasting Power of Attorney or a Deputy appointed by the Court and arrange for them to be involved;

e. Consider any need that you may have for additional support (based on your own skills and abilities);
f. Consider any support the person may need during the assessment;
g. g) Read any information that is available to you that could indicate the practicable steps that could support the person to make their own decision;
h. Establish how the person is currently supported to make decisions and the kind of decisions they are able to make; and
i. Establish if any information has already been given to the person, what this was and how it was received

Every effort should be made to find ways of communicating with someone before deciding that they lack capacity to make a decision based solely on their inability to communicate. Also, you will need to involve family, friends, carers or other professionals and identify when the person is at their best before undertaking the capacity assessment.

12 STAGE 2: 'DIAGNOSTIC' TEST OF CAPACITY THE PRESENCE OF AN IMPAIRMENT OR DISTURBANCE

12.1 This purpose of this stage in practice is to:

a. Consider the evidence regarding the presence of an impairment of, or disturbance in the functioning of the mind or brain; and
b. Decide whether such an impairment or disturbance exists; and
c. If it exists, decide whether the impairment or disturbance is the reason that the person is unable to make the decision (the causative nexus).

12.2 An impairment of or disturbance in the functioning of the mind or brain can be either:

a. Permanent or temporary;
b. Diagnosed or undiagnosed.

13 VARIATIONS IN CAPACITY

The MCA covers all types of decisions, big and small. This may be from the day-to-day, such as what to wear or eat, through to more serious or complex decisions, about, for example, where to live, whether to have surgery or how to manage finances or property.

13.1 The MCA applies to situations where someone is unable to make a particular decision at a particular time because of the way their mind or brain is affected. When suffering from depression, infection or suffering from delirium, an individual may be unable to make a decision, but when recovered they can.

13.2 People should receive support to help them make their own decisions, before it is concluded that they may lack capacity to consent to a particular decision. It is important to take all possible steps to help them reach a decision themselves.

14 BEST INTEREST'S PRINCIPLE

14.1 It is important for the application of the MCA, to have a fundamental understanding of the best interest's principle.

14.2 If a person has been assessed as lacking capacity then any action taken, or any decision made for, or on behalf of that person, must be made in his or her best interests (**principle 4)**.

14.3 The person who has to make the decision is known as the 'decision-maker' and normally will be the carer responsible for the day-to-day care, or a professional such as a doctor, nurse, therapist or social worker where decisions about treatment, care arrangements or accommodation need to be made. It is imperative that the staff member identifies and alerts the correct decision maker at the start of the process.

15 WHAT IS 'BEST INTERESTS'?

15.1 The MCA provides a non-exhaustive checklist of factors that decision-makers must work through in deciding what is in a person's best interests and achieve least restrictive practice (**principle 5**).

15.2 Some of the factors to take into consideration are:

- Do not discriminate or make assumptions about someone's best interests merely on the basis of the person's age or appearance, condition or any aspect their behavior
- Take into account all relevant circumstances
- If faced with a particularly difficult or contentious decision, it is recommended that practitioners adopt a 'balance sheet' approach, see Appendix C
- Will the person regain capacity? If so, can the decision wait
- Involve the individual as fully as possible
- Take into account the individual's past and present wishes and feelings, and any beliefs and values likely to have a bearing on the decision
- Consult as far and as widely as possible

15.3 It is vital that staff record the best interest's decision. Not only is this good professional practice, but given the evidence-based approach required by the MCA, you will have an objective record should the decision or decision-making processes later be challenged. A template can be found in Appendix C.

16 DEALING WITH DISPUTES AND DISAGREEMENTS

16.1 There may be occasions when someone may challenge the results of an assessment of capacity. In this situation it is important to raise the matter with the person who carried out the capacity assessment. If the challenge comes from the person who is said to lack capacity, they should be referred to an advocate if they are unbefriended or may need support from family or friends.

16.2 If you believe the capacity test findings are not accurate, provide reasons why you believe the assessment not to be accurate along with objective evidence to support that belief.

16.3 If the dispute cannot be resolved a second opinion may be required from an independent professional or another expert in assessing capacity. If the disagreement can still not be resolved, the person who is challenging the assessment may be able to apply to the Court of Protection. Seek advice in this instance from the Trust MCA lead or Legal team.

17 DECISION MAKING AUTHORITIES

17.1 Lasting Power of Attorney (LPA)

There are 2 types of LPA:

- Health and personal welfare
- Property and financial affairs

17.2 A person can choose to make one type or both types. The MCA allows a person aged 18 and over (the donor), who has capacity to make this decision, to appoint attorneys to act on their behalf should they lose mental capacity in the future. The Property and Affairs LPA replaces the previous Enduring Power of Attorney (EPA).

17.3 Lasting power of attorney (LPA) is a legal document that lets the 'donor' appoint one or more people (known as 'attorneys') to help them make decisions or to make decisions on their behalf. This gives them more control over what happens to them if they have an accident or an illness and can't make their own decisions if they 'lack' mental capacity.

17.4 A health and personal welfare LPA allow the attorney to make specific decisions when the person is no longer able to consent to treatment or care. The attorney is able to make decisions about day to day care, consenting or refusing medical treatments, moving accommodation, refusing life sustaining treatment, assessments for provision of community services, social activities and more.

17.5 A property and affairs LPA allow the attorney to make specified financial decisions when the person lacks capacity, but unlike a health and personal welfare LPA, a property and affairs LPA can be used even if the person has capacity (with permission).

17.6 All lasting power of attorneys should be checked either with the Office of the Public Guardian, or the attorney can be asked to provide a copy. This is to ensure that it has been registered and valid and to clarify what decisions the attorney is allowed to make under the terms of the LPA. For example, they may have been given authority to make choices about accommodation but not to refuse treatments.

17.7 A lasting power of attorney must be registered with the Office of the Public Guardian before it is valid and can only be used once the person who made it no longer has capacity. Records must reflect whether an LPA has been registered and what decisions are given to the attorney.

18 COURT APPOINTED DEPUTIES

18.1 The MCA (2005) provides for a system of court appointed deputies who are able to make decisions on welfare, healthcare, and financial matters as authorised by the Court of Protection. They are not able to refuse or consent to life sustaining treatment. A deputy will only be appointed if the person lacks capacity to make an LPA and it is thought necessary or beneficial to appoint an individual to make ongoing decisions on their behalf. A deputy may be appointed for personal welfare matters, or property and affairs, or both.

19 COURT OF PROTECTION

19.1 The Court of Protection is a superior court of record, it is able to establish precedent, set examples for future cases and build up expertise in all issues related to lack of mental capacity. It has the same powers, rights, privileges and authority as the High Court. When reaching any decision, the court must apply all the statutory principles set out in section 1 of the Act. It must make a decision in the best interests of the person who lacks capacity to make the specific decision. There will usually be a fee for applications to the court.

20 ADVANCE DECISION TO REFUSE TREATMENT (ADRT)

20.1 The MCA (2005) creates ways for people 18 and over, and to be able to make a decision in advance to refuse treatment if they should lack capacity in the future. An advance decision to refuse treatment that is not life sustaining does not need to be in writing but the person must ensure the relevant professionals know what treatment is being refused.

20.2 For an advance decision to refuse treatment to be valid, health professionals must try to establish if:

- The person has done anything since making the advance decision that would clearly suggest that they no longer agree with the advance decision
- The person has withdrawn the advance decision
- Power has been given to an attorney to make the same treatment decision as covered in the advance decision
- The person would have changed their mind if they had known more about the current circumstances

20.3 For an advance decision to refuse life sustaining treatment to apply, the person must no longer have capacity to make the decision for themselves. The advance decision must be in writing, stating exactly what treatment is to be refused and set out the circumstances when the refusal should apply, even if there is a risk to life. The advance decision must be signed by the person refusing the treatment with the signature witnessed and signed in the presence of the patient.

20.4 The Court of Protection may be asked to decide whether the advance decision exists, is valid or applicable to the current situation, if the advance decision is called into question. While a decision is being made by the court, life sustaining treatment or treatment necessary to prevent a patient's deterioration may still be provided. Advance decisions can only be made to refuse treatment; not to demand a treatment choice.

21 INDEPENDENT MENTAL CAPACITY ADVOCATE (IMCA)

21.1 An IMCA must be appointed to support a person who lacks capacity and has no family or friends to consult when any of the following apply:

21.2 It is considered that the person needs serious medical treatment. Emergency treatment however, can be carried out without waiting for the appointment or involvement of an IMCA.

- It is proposed that the person remain 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.

21.3 An IMCA may also be appointed in cases of adult protection and care reviews. The IMCA may make 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. Contact details for IMCA are on the Best Interest Decision making Scenario (Taken from Code of Conduct 12.20)

21.4 "Mary is 16 and has Down's syndrome. Her mother wants Mary to have dental treatment that will improve her appearance but is not otherwise necessary.

21.5 To be protected under Section 5 of the Act, the dentist must consider whether Mary has the capacity to agree to the treatment and what would be in her best interests. He decides that she is unable to understand what is involved or the possible consequences of the proposed treatment and so lacks capacity to make the decisions.

21.6 But Mary wants the treatment and so he takes her view into account in deciding whether the treatment is in her best interests. He also consults with both her parents, with her teacher and GP to see if there are other relevant factors to be considered.

21.7 He decides that the treatment is likely to improve Mary's confidence and self-esteem and is in her best interests."

22 DECISIONS CONCERNING FAMILY RELATIONSHIPS

22.1 Nothing in the Act permits a decision to be made on someone else's behalf on any of the following matters:

- Consenting to marriage or a civil partnership
- Consenting to have sexual relations
- Consenting to a decree of divorce on the basis of two years' separation
- Consenting to the dissolution of a civil partnership
- Consenting to a child being placed for adoption or the making of an adoption order
- Discharging parental responsibility for a child in matters not relating to the child's property, or
- Giving consent under the Human Fertilisation and Embryology Act 1990.

23 VOTING RIGHTS

23.1 Nothing in the Act permits a decision on voting, at an election for any public office or at a referendum, to be made on behalf of a person who lacks capacity to vote.

24 MENTAL CAPACITY ACT AND MENTAL HEALTH ACT INTERFACE

24.1 The MCA applies to people subject to the MHA in the same way as it applies to anyone else, with four exceptions:

- If someone is detained under the MHA, decision-makers cannot normally rely on the MCA to give treatment for mental disorder or make decisions about that treatment on that person's behalf.
- If somebody can be treated for their mental disorder without their consent because they are detained under the MHA, healthcare staff can treat them even if it goes against an advance decision to refuse that treatment.
- If a person is subject to guardianship, the guardian has the exclusive right to take certain decisions, including where the person is to live, and
- Independent Mental Capacity Advocates do not have to be involved in decisions about serious medical treatment or accommodation, if those decisions are made under the MHA.

25 MENTAL CAPACITY AND YOUNG PEOPLE

25.1 Most of the MCA applies to individuals aged 16 and over with the following exceptions:

- Only people aged over 18 and over can make a Lasting Power of Attorney
- Only people aged over 18 and over can make an advanced decision to refuse medical treatment
- The Court of Protection may only make a statutory will for a person aged 18 and over.

25.2 It is important to recognise there is a significant overlap with the Children Act (1989). As with all safeguarding, "Thinking Family" is important and there should also be consideration of the mental capacity of parents or carers. For example a young mother with a learning disability who has recently had a child, are there reasonable adjustments that should be made and is there additional support required for the family? (Chapter 12 Code of Practice)

26 RECORDING MENTAL CAPACITY ASSESSMENT GUIDELINES

26.1 Care professionals regularly make assessments of the mental capacity of service users to make decisions, as part of their day-to-day work. The Code of Practice states that where assessments of capacity relate to day-to-day decisions and caring actions care plans should note: The reason they consider the person lacks capacity, and the reason why they think the decision made, is in the person's best interests.

26.2 However as the gravity of the decision increases, the need for clear documentation grows and it is a matter of good practice that a proper assessment of capacity is made and the findings of that assessment are recorded in the specific MCA areas of RIO.

26.3 If other documentation is used to record an assessment of capacity then this must be uploaded to RIO and an entry should be made in the MCA section of RIO stating,

"Mental Capacity assessment in relation to …. Completed and uploaded.

26.4 A note should also be made in the progress notes highlighting that a mental capacity assessment has been completed i.e.

> "*Mental Capacity assessment regarding….. Completed on (date) please see MCA section of RIO or Mental Capacity assessment regarding….. completed on (date), assessment document uploaded to RIO*"

26.5 This will make it easy for other staff involved in the care of the person to know that a mental capacity assessment has been completed, what it relates to and where it is located.

26.6 In line with the Mental capacity Act code of practice Guidance, Mental Capacity Assessments should detail what steps have been taken to support and encourage the person's involvement in the capacity assessment and the decision making process including any steps that have not proven to be beneficial. The Code of Practice gives guidance on when other professionals should be involved. By implication, there is a need for a clearly documented assessment e.g. where a decision has major consequences, (e.g. to agree or decline admission to hospital, to move accommodation, to accept or decline support at home, whether to report a criminal or abusive act).

26.7 There may be a dispute with the person, their family or the care team, as to the capacity of the individual. The person's capacity may be subject to challenge. There may be legal consequences of a finding of capacity (e.g. as a result of a claim for personal injury). There may be instances where the person is making decisions that put themselves or others at risk or that result in preventable suffering or damage. In these cases recording of assessments needs to be clear and evidence application of the MCA Code of practices as these assessments are very likely to be the subject of scrutiny by interested persons, including legal representatives. These examples are not exhaustive, and each circumstance needs to be judged on its merit, using professional judgement with support from the line manager or the care team as appropriate. In these situations staff must document all attempts to help the person to make the decision themselves, and provide evidence of:

- How the person is able /unable to understand the information relating to the decision in question.
- Whether the person is able to retain the information, where their retention is limited, whether they are able to hold the information long enough to make a decision.
- How well the person is able to weigh up the decision in the balance (weigh up the pros and cons) in order to come to a decision.
- The ability of the person to communicate the decision where communication is problematic.

26.8 It is good practice as part of a care plan to clarify where a person's mental capacity is known to be impaired, and specific help is needed to help them make decisions, e.g. Where a person's mental capacity is subject to fluctuation, this should be recorded in the care plan, including any strategies known to assist the person with decision making including times of day that the person is best able to take part in an assessment.

26.9 Where a person lacks capacity and a decision or action is needed to be taken in their best interests, it will be the duty of the decision-maker to follow the statutory checklist. See Section 5 of the Code of Practice. It is important that any information relevant to their past and present wishes and feelings is clearly documented in the care plan. This information could include:

- Any advance statement.
- Any known views of the service user from when they had capacity.
- Any views of others who can advise on the person's past wishes and feelings.

26.10 Given that assessment of capacity relates to a specific decision at a specific point in time, it may be necessary to record a number of assessments of capacity as part of an ongoing record. Once it is established that the person lacks capacity for a decision a best interests decision will need to be made.

26.11 This best interest's decision will need to be recorded in the specific Best Interests section of RIO and the decision should be reflected in the persons care plan.

27 IMPLEMENTATION INCLUDING TRAINING AND COMPLIANCE

27.1 Training on the implications of the Mental Capacity Act is mandatory for all clinical staff through:

27.1.1 Class/team based training.

27.1.2 E-learning module

27.2 In addition:

27.2.1 Code of Practices, information, guidance and forms available via MCA page on the Trust intranet:

http://i-connect.kmpt.nhs.uk/trust-departments/nursing-governance/mca-dols.htm

27.2.2 The KMPT Safeguarding Department will carry out regular audits across service lines to verify the level of compliance across various service lines to check compliance with this policy.

28 EQUALITY IMPACT ASSESSMENT

28.1 The Equality Act 2010 places a statutory duty on public bodies to have due regard in the exercise of their functions. The duty also requires public bodies to consider how the decisions they make, and the services they deliver, affect people who share equality protected characteristics and those who do not. In KMPT, the culture of Equality Impact Assessment will be pursued in order to provide assurance that the Trust has carefully considered any potential negative outcomes that can occur before implementation. The Trust will monitor the implementation of the various functions/policies and refresh them in a timely manner in order to incorporate any positive changes. The Equality Impact Assessment for this document can be found on the Equality and Diversity pages of the trust intranet.

29 HUMAN RIGHTS

29.1 The Human Rights Act 1998 sets out fundamental provisions with respect to the protection of individual human rights. These include maintaining dignity, ensuring confidentiality and protecting individuals from abuse of various kinds. Employees and volunteers of the Trust must ensure that the trust does not breach the human rights of any individual the trust comes into contact with. If you think your policy/strategy could potentially breach the right of an individual contact the legal team.

APPENDIX A CHECKLIST FOR PRACTITIONERS APPLYING THE MENTAL CAPACITY ACT

Checklist for Practitioners applying the Mental Capacity Act

5 Principles: Apply them in practice

1. Assume the person has capacity unless proven otherwise
2. Enable capacity by assisting the person when making a decision (use visual aids/ written words/ interpreters etc. as appropriate)
3. If a person with capacity makes an unwise or eccentric decision this must be respected
4. If a person lacks capacity treatment decisions must be made in the person's best interests (follow the statutory checklist)
5. The treatment given should be the least restrictive option to the person's rights and freedoms

Ref Code of Practice Chapter 2

Supporting Decision Making: Have you,

- Been clear about what decision needs to be made, define it clearly and concisely (this helps in other aspects of the Act)
- Made every effort to enable the person to make the decision themselves, by being flexible and person-centred
- Provided information about the decision in a format that is likely to be understood including information relating to any alternative options
- Used a method of communication/language that the person is most likely to understand
- Made the person feel at ease and given consideration to what is likely to be the most conducive time and location for them to make the decision
- Considered if others can help the person understand information or make a choice

Ref Code of Practice Chapter 3

Assessing capacity:

Does the person have an impairment or disturbance in the functioning of the mind or brain? (temporary or permanent)

If yes practitioners must complete the 4 part functional test. Can the person….

1. Understand the information relevant to the decision?
2. Retain the information long enough to make a decision?
3. Weigh up the consequences of making the decision?
4. Communicate their decision by any means?

If the person fails to demonstrate ability in any of the four areas they would be deemed as lacking capacity to consent to or refuse that specific decision.

Ref Code of Practice Chapter 4

Checklist for Practitioners applying the Mental Capacity Act (cont….)

Decision Maker: Have you,

- Identified the decision maker
- Identified if the person has a registered Lasting Power of Attorney (LPA) or a court appointed deputy (CAD) for personal welfare who can consent or refuse treatment
- Considered if decision can be delayed till the person regains capacity

Ref Code of Practice Chapter 5; 7 & 8

IMCA:

Does the person require an Independent Mental Capacity Advocate

Ref Code of Practice Chapter 10

Deciding Best Interests Checklist : have you

- Encouraged participation
- Not discriminated or been driven by a desire to bring about death
- Considered person's views and wishes
- Promoted the person's rights
- Identified if the person has an Advance Decision to Refuse Treatment (ADRT) that is valid and applicable.
- Identified and spoken with family friends or others to be consulted
- Considered all relevant factors
- Reviewed the risks and benefits of the proposed procedure and its alternatives including not providing treatment. (options appraisal)
- Reviewed and weighted all of the evidence considering medical social welfare emotional and ethical aspects.
- Arrived at a decision
- Communicated your decision and rationale
- Put in place steps to implement the decision that is least restrictive

Ref Code of Practice Chapter 5

Protection From Liability:

Follow the Act; document it and you will receive protection from liability

Ref Code of Practice Chapter 6

APPENDIX B MENTAL CAPACITY ASSESSMENT FLOWCHART

STAGE ONE FUNCTIONAL ASSESSMENT

The functional test consists of 4 elements. It tests the person's ability:

1. To understand information about the decision (the 'relevant' information);
2. Retain the information long enough to make the decision;
3. To use, or 'weigh up' the information as part of the decision-making process; and
4. To communicate their decision through any means

Apply the MCA principles below

✓ **If the Person can do all 4 elements then they can make the decision and this should be respected**

X If not then proceed to stage 2 in blue below

TO EFFECTIVELY PREPARE FOR ASSESSESSMENT OF THE FUNCTIONAL ELEMENTS, YOU SHOULD;

1. Understand the nature of the decision to be made;
2. understand the range of options available to support patient weigh these;
3. Consider & prepare the information that is relevant to the decision;
4. Establish whether there is a donee of a Lasting Power of Attorney or a Deputy appointed by the Court and arrange for them to be involved;
5. Consider your needs for additional support (based on your own skills and abilities);
6. Establish what support the person may need during the assessment
7. Read information sources available to you that could inform you on practicable steps that could be used to support the person to make their own decision;
8. Establish how the person is currently supported to make decisions and the kind of decisions they are able to make

CONSIDER & APPLY THE FIVE PRINCIPLES OF THE MCA

a. Presumption of capacity
b. Support decision making
c. Unwise decisions
d. Best Interest Decision
e. Less Restrictive option

STAGE 2: 'DIAGNOSTIC' TEST OF CAPACITY THE PRESENCE OF AN IMPAIRMENT OR DISTURBANCE

An impairment of or disturbance in the functioning of the mind or brain can be either:

a. Permanent or
b. temporary; Diagnosed or undiagnosed

THIS PURPOSE OF THIS STAGE IN PRACTICE IS TO:

a. Consider the evidence regarding the presence of an impairment of, or disturbance in the functioning of the mind or brain; and
b. If it exists, decide whether the impairment or disturbance is the reason that the person is unable to make the decision (the causative nexus).

APPENDIX C BEST INTERESTS DECISION BALANCE SHEET TEMPLATE

How to use this form:

- Consider using this form for complex decisions. Copy additional sheets where necessary. It should support adherence to the best interest checklist
- Avoid drawing any conclusions until all the options have been identified and explored
- Consider "how likely is it that this benefit / risk will be realised?" as part of the decision making Process
- Is an IMCA referral required? If there is no one to consult (other than paid staff) to support or represent the person, or to be consulted as part of the best interest decision process.
- Have you identified and taken into account the person's past and present wishes and preferences, beliefs and values (including their treatment preferences): whether written or verbal?
- Please note that taking no action could be considered as a possible option and can be balanced against other possible options to carry out a course of action.

OPTION 1

Benefits to the Service User	Risks posed to the Service user

OPTION 2

Benefits to the Service User	Risks posed to the Service user