NHS
Hertfordshire and
West Essex
Integrated Care Board

NHS Herts and West Essex Integrated Care Board (ICB)

Mental Capacity Act and Deprivation of Liberty Safeguards Policy

Document Control:

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Approved By	**HWE ICB Board**
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Responsible Director	**Director of Nursing and Quality**
Directorate	**Nursing & Quality**
Staff Audience	All staff working within or on behalf of HWEICB plus those contracted by HWEICB and who are involved with people 16yrs and over who may lack mental capacity to make decisions for themselves.
Review Date	**July 2024**
Description	This policy sets out the role and responsibilities of the ICB in respect of the Mental Capacity Act and Deprivation of Liberty Safeguards
Superseded Documents (if applicable)	**Mental Capacity Act V1.1**

Version	Page	Details of amendment	Author
V1.0 (01/07/2022)		**Approved by HWE ICB Board**	
V1.1 (31/08/2023)	**2**	**Review date confirmed and added to Document Control section**	
V2 (11/12/2023)		**Merged Deprivation of liberty Safeguards and Mental Capacity Act policies.**	**RG, CM and CMC**

Content

1. Introduction

The Mental Capacity Act 2005 (MCA) came into force in 2007 and provides a legal framework for the care, treatment and support of people aged 16 years and over, in England and Wales, who are unable to make some or all decisions for themselves. Anyone supporting people who lack mental capacity must have regard to the Mental Capacity Act. The MCA is accompanied by a statutory Code of Practice that explains how the MCA will works on a day-to-day basis and provides guidance to all those working with, or caring for, people who lack mental capacity. As the Code has statutory force, all HWEICB staff are legally required to 'have regard' to the MCA Code of Practice.

The underlying philosophy of the MCA ensures that any decision made, or action taken, on behalf of someone who lacks the mental capacity to make decisions or act for themselves is made in their best interests and must always be the least restrictive option.

This policy should be read in conjunction with the Mental Capacity Act 2005 Code of practice, the Southend, Essex and Thurrock (SET) Mental Capacity Act and Deprivation of Liberty Safeguards policy and Guidance and the Multi-agency Hertfordshire Policy on Mental Capacity and DoLS. These can be accessed below:

Mental Capacity Act 2005 Code of Practice

Essex MCA and DOLS Policy

Hertfordshire policy on mental capacity

Hertfordshire Policy for DOLs

2. Purpose

This policy aims to ensure that robust systems are in place to safeguard and promote the rights of people without mental capacity,

It applies to all HWEICB employees irrespective of their role within the organisation. In particular those who visit patients and their families and carers, and those who are responsible for commissioning NHS funded nursing care and NHS continuing healthcare.

HWEICB will inform other commissioners of care or treatment services regarding non-compliance with the MCA where services are commissioned in coordination with HWEICB.

HWEICB will inform the police if it has cause to believe a crime has been committed under section 44 of the MCA 2005 (the ill treatment or wilful neglect of an adult who lacks capacity). HWEICB will follow the Childrens Act and make appropriate referrals.

Relevant Legislation, Guidance and Policies

Relevant legislation includes, but is not limited to:

- The Mental Capacity Act 2005 (Amended 2007 and 2019)
- The Mental Capacity Act: Code of Practice
- The Childrens Act (2004)
- Deprivation of Liberty Safeguards (DoLS): Code of Practice
- The Mental Health Act (2003)
- The Human Rights Act (1998)
- The European Convention on Human Rights

3. Definitions

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
Best Interests	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) for health and welfare	This lasting power of attorney allows you to choose people to act on your behalf (as an attorney) and make decisions about your health and personal welfare, when you are unable to make decisions for yourself.
Lasting Power of Attorney for Finance and property	This lasting power of attorney allows you to choose people to act on your behalf (as an attorney) and make decisions about your finance and property when you are unable to make decisions for yourself. Eg paying your household, care and other bills

4. Roles and responsibilities

4.1 Roles and responsibilities within the organisation

In order to carry out its responsibilities with respect to the Mental Capacity Act HWEICB will:

- Identify a named MCA lead and ensure that relevant policy, procedure and organisational structures support their role as MCA lead.
- Raise awareness to all staff of their responsibilities with respect to the

MCA

- Provide training with regard to the Mental Capacity Act. Staff should be updated every 3 years or when there are changes to the law.
- Develop a clear line of accountability for mental capacity matters, built into internal HWEICB governance arrangements.
- Engage with local Safeguarding Adults and Children Boards and board sub-groups.
- Work with local agencies to provide joint strategic leadership on MCA in partnership with Local Authorities, provider clinical governance teams and safeguarding leads, CQC, and where applicable, the police.
- Ensure that provider contracts specify compliance with MCA legislation and that commissioned services are supported, and contracts monitored for compliance with MCA.
- Inform future practice and commissioning applying learning from cases where mental capacity has been an issue
- Safeguarding and MCA leads work within the local health and social care economies to influence local thinking and practice around MCA
- Promote, implement and monitor best practice around mental capacity within the ICB and within commissioned provider services.

The Director of Nursing and Quality is the named Executive Lead to provide board leadership for adult and children safeguarding issues and the Mental Capacity Act within HWEICB. This responsibility is reflected within their portfolio and job description and is clearly identified within the organisation and on external communications.

4.2 Responsibilities of Providers

Provider organisations are responsible for:

- Compliance with MCA legislation (including DoLS) within and across their organisation.
- There is clarity as to who holds corporate responsibility for MCA and DoLS functions within the organisation, and that appropriate governance and safeguarding systems are in place to deliver best practice.
- Providing assurance to HWEICBs that responsibilities with respect to MCA are being safely discharged.

HWEICB will oversee these responsibilities.

4.3 Consultation and Communication with Stakeholders

This policy has been reviewed in line with ICB governance processes.

HWE ICB comply with the Equality and Diversity Act (2010) and Public Sector Equality Duty (2011) and as such recognise that some individuals with protected characteristics may need additional support to understand and interpret this Policy. The ICB Safeguarding Team will respond to any direct or indirect request for support in interpreting this policy, which includes clarification and translation.

5. Mental Capacity Act 2005

5.1 The Guiding principles of the MCA 2005

The MCA 2005 applies to individuals aged 16 and over and sets out five statutory principles as below:

1. Principle 1 – A presumption of capacity
2. Principle 2 – The right to be supported when making decisions
3. Principle 3 – An unwise decision cannot be seen as a wrong decision
4. Principle 4 – Best interests must be at the heart of all decision making
5. Principle 5 – Any intervention must be with the least restriction possible

There are a number of reasons why people may question a person's capacity to make a specific decision:

- The person has been diagnosed with an impairment or disturbance that affects the way in which their mind or brain works and it has already been shown that they lack capacity to make other decisions in their life.
- The person's behaviour or circumstances cast doubt as to whether they have capacity to make a decision.
- Somebody else says that they are concerned about the person's capacity.

The MCA stipulates that a Mental Capacity Assessment has 2 parts:

First part - diagnostic test- is there an impairment of or disturbance in the functioning of a person's mind or brain? (this does not mean that a formal medical diagnosis is required).
Second part - functional test - is the impairment or disturbance sufficient that the person lacks the capacity to make a particular decision?

The MCA says that a person is unable to make their own decision if they cannot do one or more of the following four things:

1. **Understand** the information given to them
2. **Retain** that information long enough to be able to make the decision
3. **Weigh up** the pros and cons of the information available to make the decision
4. **Communicate** their decision - this could be verbally, using sign language or even simple muscle movements such as blinking an eye or squeezing a hand

The burden of proof is on the assessor/decision maker to provide evidence that the person does not meet any of the functions above and to prove that, on the balance of probability, the person lacks mental capacity to make the decision at the time it needs to be made if this is the case.

At times individuals may struggle to make decisions because of a number of factors unrelated to any impairment or disturbance that they may or may not suffer. These factors can be:

- Pressure, coercion, duress (Serious Crime Act 2015, Domestic Abuse Act 2021)
- Lack of sufficient information
- Information is not provided in an accessible format.

In this situation, assessors/decision makers should ensure adjustments and support are offered to ensure that the person is enabled to make their own decision.

On occasions a person may refuse to engage in an assessment of their mental capacity to make a specific decision. When this occurs all efforts should be made to establish a rapport with the person to seek their engagement, and to explain the consequences of not making the relevant decision. Where this occurs the person concerned must be informed that the professional will determine their ability to make a specific decision on the balance of probability, taking into account the information they already have about the person, their cognitive ability, diagnosis and presentation.

Mental capacity assessments should always be robustly documented.

5.2 Best Interest Decision Making

6.2

Once established that a person lacks mental capacity to make a specific decision, a decision falls to the best interest decision maker. This decision can only be made once all steps have been taken to understand what the person would have wanted if they had capacity. This can be established through talking with a person's family and friends and other health professionals.

When important decisions are to be made, such as change of medical treatment, place of residence or consenting to medical treatment the best interest decision process should be recorded.

Day to day decisions such as which meal to choose, will usually involve a brief verbal assessment and can be recorded in the individual care plan.

In emergency situations it will almost always be in the best interest of a person who lacks mental capacity, to give urgent medical treatment, except where there is a current advance decision to refuse treatment in place (which is valid and applies to the treatment in question) or a Do Not Attempt Cardiopulmonary Resuscitation (DNACPR) if relevant.

5.3 Reviewing mental capacity assessments

People can improve their decision-making capabilities and it is therefore essential to ensure a regular review occurs for each individual person. Mental capacity should always be reviewed:

- Whenever a care plan is being developed or reviewed
- At other relevant stages of the care planning process, and
- As particular decisions need to be made.

This ensures that the provision of care/support and/or treatment is carried out on a lawful basis.

If the person's condition does not change and the original mental capacity assessment recorded on the form remains valid and applicable to the same decision, the care plan should reflect this.

5.4 Court of Protection (COP)

Some treatment decisions are so serious that the court has to make them - unless there is a Lasting Power Attorney (LPA) with power to make the decision, or a valid and applicable Advance Decision relevant to the decision, for example:

- Withholding or withdrawing artificial nutrition and hydration from a person in a persistent vegetative state
- Donating an organ or bone marrow to another person
- The proposed non therapeutic sterilisation of a person who lacks capacity to consent
- Cases where there is dispute about whether a particular treatment will be in a person's best interests

6. DEPRIVATION OF LIBERTY SAFEGUARDS (DOLS)

The DOLS apply to people in England and Wales who:

- Are over 18yrs of age
- Have a mental disorder/impairment
- Lack capacity to agree to the arrangements made for their care and treatment in circumstances that amount to a deprivation of liberty
- It is in their own best interest to protect from harm
- It is a necessary and proportionate response to the likelihood and seriousness of harm
- There is no less restrictive alternative

6.1 What Constitutes a Deprivation of Liberty?

There is no simple definition of what constitutes a deprivation of liberty but evolving case law has provided guidance to assist staff and institutions applying the law.

A Supreme Court judgement in 2014 stipulated that when considering whether someone is being deprived of their liberty, there are two key questions to ask, which was described as the 'Acid Test':

- Is the person subject to continuous supervision and control?
- Is the person free to leave? (The person may not be saying this or acting on it but the issue is about how staff would react if the person did try to leave - i.e. would they be kept on the ward in their best interest or allowed to go?)

The Acid Test means that if a patient is subject both to continuous supervision and control and not free to leave (whether or not they are trying to leave) they are being deprived of their liberty.

The person's compliance/lack of objection and the reason for the restriction (i.e. delivering health care) are not relevant when considering whether a DoLS is required.

Before making an application the proposed DoLS should, where practically possible, be discussed with family members and/or any relevant others to see if they agree that it is appropriate and that the deprivation of liberty is necessary.

DoLS provide for deprivations of liberty to be made lawful through urgent or standard authorisation processes. Requests for standard (non-urgent) authorisations are sent to the Local Authority relevant to where the person lives and a series of assessments are carried out to decide whether the request is authorised or not. This is generally the case where care is planned in advance e.g. admission to a care home.

Deprivation of Liberty for Under 18s

If a young person cannot or does not consent to the confinement, no-one (including parents) can provide such consent on their behalf and a legal procedure to seek authorisation will be required.

In these circumstances, a deprived of their liberty will need to be sought under the inherent jurisdiction by the Family Division of the Royal Court of Justice.

Further information on the application of DoLS forms can be found: Deprivation of liberty safeguards: resources - GOV.UK (www.gov.uk)

6.2 Staff responsibilities

A deprivation of liberty can occur in a care home, hospital, or domestic setting such as supported living or an in the individual's own home. For those deprived of their liberty in a care home or hospital a DoLS is authorised by the Local Authority. Within domestic settings, applications are made to the Court of Protection.

HWEICB Staff Responsibilities if they are concerned that an individual is deprived of their liberty in a hospital or care home.

- Where an ICB employee, in performing their duties, feels a deprivation of liberty is occurring (See section on 'acid test' above) then they need to take account of the setting in which care is being delivered.
- If the care is in a hospital or care home setting, then the ICB employee should ask the Managing Authority to make an application for authorisation under Deprivation of Liberty Safeguards to the appropriate Supervisory Body. They should assure themselves that this has been done.
- Where the ICB employee feels the Managing Authority are not acting on their concerns discussion should take place with the Supervisory Body, i.e., the local authority lead.

• Where the ICB employee recognises that a potential deprivation of liberty may be occurring in a setting other than a hospital or care home then the Deprivation of Liberty Checklist should be completed (see Appendix 1).

• If it is still deemed that a Deprivation of Liberty is unavoidable then an application to the Court of Protection should be initiated – consult the CHC Clinical Lead or HWEICB MCA Lead for further advice.

HWEICB Staff Responsibilities in Making an application for a Deprivation of Liberty Safeguard, to the Court of protection, when an individual is in a domestic setting. The coordination of this is completed by the HWEICB CHC team by following the process below:

I. An accurate list of all individuals that lack capacity to consent to their care which will deprive them of their liberty must be kept by the CHC team.

II. This must be reviewed monthly in order to ensure applications are completed in a timely manner

III. Confirm that the individual is fully funded by the ICB

IV. Liaise with the legal team and with their support and guidance:

V. Carry out and complete a Court of Protection Mental Capacity Assessment (COP form 3)

VI. Prepare a detailed care plan/best interest statement/transition plan (if required)

VII. Arrange meetings with those involved in the individual's care and welfare to gather views and opinions. If there is no relevant person identified, consult with the Independent Mental Capacity Advocate (IMCA).

VIII. Liaise with the GP and/or psychiatrist to obtain the medical evidence to support the Application

IX. Forward all the completed paperwork to the MCA Lead for HWEICB for information.

COP form 3 Assessment of Capacity

COP form 10 Application to authorise a Deprivation of Liberty

The CHC clinical and administration staff will complete the process for applications as detailed below:

1. The administration team securely send all relevant documentation to the legal team.

2. The administration team will track the progress and details of the applications on the Deprivation of Liberty spreadsheet in the shared drive in liaison with the legal team.

3. Once the application is authorised the administrator will update the spreadsheet of the date when the process will need to be reviewed and notify the CHC team of this.

4. All copies of the authorised application will be sent to the CHC team for uploading to the individual's record.

Once the application has been authorised by the COP the CHC team will review mental capacity of the individual and deprivations of liberty in line with the terms of the order, or when there has been a change in condition.

6. Accountability

The Director of Nursing and Quality is the named Executive Lead to provide board leadership of adult safeguarding issues, Mental Capacity Act and DoLS within HWEICB. This responsibility is reflected within their portfolio and job description and is clearly identified within the organisation and on external communications.

7. Education and training

All staff are required to undertake relevant training and safeguarding supervision commensurate with their duties and responsibilities as outlined in the Intercollegiate Document 'Adult Safeguarding: Roles and Competencies for Health Care Staff' and the ICB document 'A Learning Approach to Adult Safeguarding'.

Staff requiring support should speak to their line manager in the first instance.

8. References

Intercollegiate Document 'Adult Safeguarding: Roles and Competencies for Health Care Staff'

Adult Safeguarding: Roles and Competencies for Health Care Staff

Mental Capacity Act 2005 Code of Practice

Mental Capacity Act 2005 Code of Practice

SET Mental Capacity Act and Deprivation of Liberty Safeguards Policy and Guidance

SET Mental Capacity Act and Deprivation of Liberty Safeguards Policy and Guidance

Hertfordshire Policy on Mental Capacity

Hertfordshire Policy on Mental Capacity

9. Policy Review

The Mental Capacity Act Policy will be reviewed 3 yearly and in accordance with the following on an "as and when required" basis:

- Legislative changes
- Good practice guidance
- Case law
- Serious Incidents
- Safeguarding Adults Reviews, (where applicable)
- Changes to organisational infrastructure

10. Glossary of Abbreviations

COP	Court of Protection
DNACPR	Do Not Attempt Cardiopulmonary Resuscitation
DoLS	Deprivation of Liberty Safeguards
LPA	Lasting Power of Attorney
MCA	Mental Capacity Act/Mental Capacity Assessment

Appendix 1 - NHS Herts and West Essex ICB Equality Impact Assessment Screening Form

Very occasionally it will be clear that some proposals will not impact on the protected equality groups and health inequalities groups.

Where you can show that there is no impact, positive or negative, on any of the groups please complete this form and include it with any reports/papers used to make a decision on the proposal.

Title of policy, service, proposal etc being assessed:
Mental capacity Policy.

What are the intended outcomes of this work? This policy aims to ensure that no act or omission by Hertfordshire and West Essex Integrated Care Board (HWEICB) as a commissioning organisation puts people aged 16 years and over without mental capacity at risk and that robust systems are in place to safeguard and promote the rights of people without mental capacity in commissioned services.
How will these outcomes be achieved? Staff required to follow the policy direction in relation to decision making for those people who lack mental capacity in circumstances that fall within the remit of this policy
Who will be affected by this work? All staff working in the ICB and the service users that are defined within the remit of this policy

What evidence have you considered? As stated in section 4.3 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to the neutral.
Age

This Policy relates to people over the age of 16. As stated in section 4.3 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to the neutral
Disability Subjects who have any difficulty with sight, reading, or interpreting critical or complex information (either verbal or written) may require additional support to interpret information As stated in section 4.3 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to the neutral
Gender reassignment (including transgender) This Policy relates to all included subjects irrespective of gender re-assignment As stated in section 4.3 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to the neutral
Marriage and civil partnership This Policy relates to all included subjects irrespective of marital/partnership status As stated in section 4.3 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to the neutral
Pregnancy and maternity This Policy relates to all included subjects irrespective of pregnancy or maternity status As stated in section 4.3 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to the neutral
Race Subjects whose first language is not English may require additional support with translation of the policy. For some people this policy may not be understandable

and as such may need additional support to understand the Law and Statutory guidance that underpins this policy As stated in section 4.3 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to the neutral
Religion or belief Subjects may require additional support with the context interpretation of the policy and as such may need additional support to understand the Law and Statutory guidance that underpins this policy As stated in section 4.3 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to the neutral
Sex This Policy relates to all included subjects irrespective of Sex As stated in section 4.3 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to the neutral
Sexual orientation This Policy relates to all included subjects irrespective of sexual orientation As stated in section 4.3 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to the neutral
Carers This Policy relates to all included subjects irrespective of carer status As stated in section 4.3 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to the neutral
Other identified groups

Subjects may require additional support with the context interpretation of the policy and as such may need additional support to understand the Law and Statutory guidance that underpins this policy. As stated in section 4.3 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to the neutral

Engagement and involvement
How have you engaged stakeholders with an interest in protected characteristics in gathering evidence or testing the evidence available? Advice from ICB Equality and Diversity Lead
How have you engaged stakeholders in testing the policy or programme proposals? Consultation with ICB Continuing Health Care Teams.
For each engagement activity, please state who was involved, how and when they were engaged, and the key outputs:

Summary of Analysis Considering the evidence and engagement activity you listed above, please summarise the impact of your work. NA
Now consider and detail below how the proposals could support the elimination of discrimination, harassment and victimisation, advance the equality of opportunity and promote good relations between groups (the General Duty of the Public Sector Equality Duty). The ICB ensures that the policy enables subjects to access to support from the ICB Safeguarding Team to interpret the policy and support full understanding by any person who it relates to, where required

Eliminate discrimination, harassment and victimisation Ensure that the policy does not contain discriminatory language and re-iterates the universal provisions for this policy
Advance equality of opportunity As stated in section 4.3 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to the neutral
Promote good relations between groups This policy is universally applied to all subjects in relation to supporting decision making.

Next Steps Some individuals with protected characteristics around Disability, Race, Religion or Belief and other identified groups such as individuals who are not UK citizens may require support in relation to the interpretation or translation of this policy. This has been addressed by the policy which includes provision (In section 4.3) for any affected individual to be encouraged to approach the safeguarding team for support with interpretation or translation.

Having considered the proposal and sufficient evidence to reach a reasonable decision on actual and/or likely current and/or future impact I have decided that a full equality impact assessment is not required.	
Assessor's name and job title:	No specific evidence of need relating to the protected equality groups is presented, however it is clear that there is likely to be an impact on protected equality groups. The proposal recognises that and states that the needs of the equality groups should be met and that, if those needs are met, the impact will be neutral. Decision makers should assure themselves that this is sufficient for them to be able to show Due Regard, as required by the Equality Act 2010. Paul Curry, Equality and Diversity Lead, 1 February 2024