Gateshead Health
NHS Foundation Trust

Policy Title	Mental Capacity Act 2005
Policy Number	RM74
Version Number	4.1
Ratified By	Safeguarding Committee
Date Ratified	05/04/2019
Effective From	27/06/2019
Author(s) *(name and designation)*	[redacted], Strategic Safeguarding Lead
Sponsor	Chief Nurse
Expiry Date	01/04/2022
Withdrawn Date	

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Version Control

Version	Release	Author/Reviewer	Ratified by/Authorised by	Date	Changes (Please identify page no.)
1.0	June 2011	[redacted]	Central Team	24/06/2011	
2.0	01/08/2013	[redacted]	Safeguarding Committee	19/07/2013	P.16 Changes in delivery of training. P.17 Monitored by Safeguarding Committee
3.0	21/12/2016	[redacted]	Safeguarding Committee	02/12/2016	Updated MCA forms 1 & 2 Changes to reflect restructure and new job roles.
4.0	27/06/2019	[redacted]	Safeguarding Committee	05/04/2019	Review of policy
4.1	10/6/21	[redacted]	EMT		Exec Lead changed to Chief Nurse (from Director NMQ)

Contents

SectionPage

Appendices

Mental Capacity Act 2005

1 Introduction

1.1 Mental capacity is the ability to make decisions. Capacity can vary over time and by the decision to be made. There are a number of permanent or temporary conditions that can affect a person's capacity to make a decision, for example dementia, stroke, unconsciousness (due to illness or treatment) or substance misuse.

1.2 The Mental Capacity Act 2005 (the Act) provides a statutory framework to empower and protect vulnerable people, who may not be able to make their own decisions. It makes it clear who can take decisions on behalf of others, in which situations, and how they should go about this. The Act also enables people to plan ahead for a time when they may lose capacity.

1.3 The Act applies to people of 16 or over who lack capacity to make their own decisions. A Code of Practice accompanies the Act. All people acting in a professional capacity, such as doctors and nurses, have a duty to have regard to the Code.

1.4 The Act introduced a new criminal offence of ill treatment or wilful neglect of a person who lacks capacity. A person found guilty of such an offence may be liable to imprisonment for a term of up to five years. There is no sanction for failing to comply with the Code of Practice but failure to do so may be used as evidence in civil or criminal proceedings. Section 44, MCA.

2 Policy scope

2.1 Gateshead Health NHS Foundation Trust employees have a key role in helping and supporting vulnerable people. Employees are often at the centre of the process of supporting people to understand what decisions need to be made and why, and what the consequences of those decisions will be. This policy applies to all employees of Gateshead Health NHS Foundation Trust, who work with vulnerable people over 16 years of age who may lack the capacity to make their own decisions.

2.2 The Act also applies to everyone involved in the treatment, care, or support of someone who lacks capacity (including paid carers and family carers).

3 Aim of policy

3.1 The aim of this policy is to provide a framework to:

- enable employees to adhere to the principles of the Act.
- follow the Code of Practice in assessing capacity, and in acting in the patient's best interests.
- provide patients, carers and other organisations with information about Gateshead Health NHS Foundation Trust's guiding principles, roles and responsibilities in relation to the Mental Capacity Act (2005).

4 Duties (roles and responsibilities)

Trust Board
The Trust Board is committed to ensuring safe and effective patient care, and therefore supports the process for assessing capacity and acting in the patient's best interest. The Trust Board have responsibility for ensuring compliance with the Act.

Chief Executive
The Chief Executive is ultimately accountable for the delivery of safe and effective patient care. They are responsible for ensuring appropriate systems are in place to enable employees adhere to the principles of the Act, and the Code of Practice.

Safeguarding Committee
The Safeguarding Committee is responsible for ratifying the Policy and monitoring the training.

Ward Managers/Team Leaders
Ward Managers and Team Leaders are responsible for ensuring a copy of the Code of Practice is available to staff. They are responsible for ensuring their staff are aware of the policy and principles, and promote best practice. The must ensure their staff receive appropriate training.

All Staff
All staff are responsible for being aware of the Act and the Trust policy. They should follow the Code of Practice when assessing capacity and acting in the patient's best interests.

Safeguarding Adults Team
The Safeguarding Adults Team is responsible for providing formal and informal training for all staff.

5 Definitions

Mental capacity
Having mental capacity means that a person is able to make their own decisions. The law states that a person is unable to make a particular decision if they cannot do one or more of the following four things:-

- Understand information given to them
- Retain information long enough to be able to make a decision
- Weigh up the information available to make a decision
- Communicate their decision

Decision
Decisions range from the everyday, such as getting out of bed and what to wear/eat to the more complex such as deciding whether to undergo medical treatment or change place of residence.

Capacity Assessment
An assessment of the patient's ability to make a particular decision at a particular time.

Decision Maker

The person who wishes to take some action in connection with the patient's care or treatment, or the person who is contemplating making a decision on the patient's behalf. They will use the MCA1 and MCA2 forms to do this (see Appendices).

Best Interests
The Act states that an act done or a decision made on behalf of an individual who lacks capacity, must be in that persons best interests. The best interest checklist attached in **Appendix 2** must be used for all complex decisions.

Restraint/Restriction/Force
Sometimes a person's freedom may need to be restricted in order to provide care or treatment that is in their best interests.

Independent Mental Capacity Advocate (IMCA)
This is a specialist advocate who can represent the patient and their best interests if they have no family/friends to speak on their behalf. There is a statutory duty to refer to an IMCA in certain situations.

Lasting Power of Attorney (LPA)
This is a formal legal document which confers on the attorney the authority to make decisions on the patient's behalf. This may relate to decisions about financial affairs, personal welfare, healthcare and consent to medical treatment.

Advance Decision to Refuse Treatment
A patient may make and record a decision that they do not want to receive certain forms or methods of treatment in the future, even if it results in their death.

Court of Protection
A specialist Court that deals with all matters relating to Mental Capacity.

Public Guardian
The administrative arm of the Court of Protection.

Mental Health Act (1983)
Mental Health Act (MHA) provides ways of assessing, treating and caring for people who have serious mental disorder that puts them or other people at risk.

6 Key principles of the Act

The Act is underpinned by a set of five key principles that employees must always take into account:

- 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 it is proved otherwise;

- The right for individuals to be supported to make their own decisions - people must be given all practicable help before anyone treats them as not being able to make their own decisions;
- The right for individuals to make unwise decisions – just because a person makes what might been seen as an unwise decision, they should not be treated as lacking in capacity;
- Best interests – anything done for or on behalf of people without capacity must be in their best interests; and
- The less restrictive option – anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

6.1 Determining lack of capacity

The Act sets out a test for assessing whether a person lacks capacity to take a particular decision. This test is 'decision' and 'time' specific'. The decision maker must use the MCA1 and MCA2 forms when assessing the mental capacity of patients (see appendices). The decision maker should seek information or support from other employees, partners and other service providers during the course of this work.

The Test

To ensure the patient can :-

- Understand information given to them
- Retain information long enough to be able to make a decision
- Weigh up the information available to make a decision
- Communicate their decision

The following questions must be considered when completing the test:

- Does the patient have all the relevant information needed to make the decision in question?
- Could the information be explained or presented in a way that is easier for the patient to understand?
- Are there particular times of the day when the patient's understanding is better or particular locations where they may feel more at ease?
- Can the decision be put off until the circumstances are right for the person concerned?
- Can anyone else help or support the patient to make choices or express a view, such as an independent advocate or someone to assist communication?

Where doubts remain about capacity, the decision maker needs to be able to show on the balance of probabilities that the person lacked capacity to make that particular decision at that particular time. If the doubt remains, for example, the patient has a complex mental health condition; the decision maker should consider making a referral to a psychiatrist or psychologist for further assessment.

The decision maker is responsible for ensuring that the outcomes of all assessments are recorded in the patient's records.

6.2 The best interest of the person who lacks capacity

Where care or treatment is provided for someone who lacks capacity, that care can be provided without incurring legal liability. This applies to actions that would otherwise result in a civil wrong or crime when interfering with a person's body or property in the ordinary course of caring. For example, by giving an injection or by using the person's money to buy items for them.

The key to this protection from liability is that a proper assessment and recording of capacity and best interests has taken place. Options to be considered need to be decided prior to assessment of capacity as these should be the same regardless of the outcome of the assessment.

The assessment will include as a minimum, the following factors:-

- Equal consideration and non-discrimination
- Considering all relevant circumstances
- Regaining capacity
- Permitting and encouraging participation
- Special considerations for life sustaining treatment
- The Service User's wishes and feelings, beliefs and values
- The views of other relevant people.

Decision makers also need to consider the following:

Restraint:

- Is it necessary to prevent harm to the person who lacks capacity, or to others?
- It is a proportionate response to the likelihood of the person suffering harm, and to the seriousness of that harm.
- Could restraint be classed as a 'deprivation of the person's liberty'? If so, employees must refer to the Deprivation of Liberty Safeguards Policy.

Conflict during decision-making:-

- Does the action conflict with a decision that has been made by an attorney or deputy under their powers?

Paying for necessary goods and services:-

- Are those goods or services necessary and in the person's best interests?
- Is it necessary to take money from the person's bank or building society account or to sell the person's property to pay for goods and services? If so, formal authority will be required.

The Act only gives employees the power to make decisions connected to the care and treatment of the patient. It does not give employees the power to make any other decisions on behalf of a patient who lacks capacity. The power

to make decisions on behalf of a patient who lacks capacity can be granted through other parts of the Act (such as the powers of attorneys and deputies).

There are two circumstances when the best interest's principle will not apply. The first is where a service user has previously made an advance decision to refuse medical treatment whilst they had the capacity to do so. Employees must abide by an advance decision made by the patient prior to loss of capacity, even if others think that the decision to refuse treatment is not in the patient's best interests. The second area in which best interest principles do not apply, concerns the patient's involvement in research, which is covered later in this policy.

6.3 Decisions that are not covered by the Act

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

- consenting to marriage or civil partnership
- consenting to have sexual relationships
- 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
- giving consent under the Human Fertilisation and Embryology Act 1990

Where a person who lacks capacity to consent is currently detained and being treated under Part 4 of the MHA, nothing in the Act authorises anyone to:-

- give the person treatment for mental disorder, or
- consent to the person being given treatment for mental disorder

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

For the avoidance of doubt, nothing in the Act is to be taken to affect the law relating to murder, manslaughter or assisting suicide.

Although the Act does not allow anyone to make these decisions on behalf of someone who lacks capacity to make such a decision for himself or herself, the Act does not prevent action being taken to protect a vulnerable person from abuse or exploitation.

6.4 Independent Mental Capacity Advocate

The purpose of the statutory IMCA is to assist in making best interest decisions about serious medical treatment and changes of accommodation for people who lack capacity. The IMCA service is available to those people who have no family or friends whom it would be appropriate to consult about those decisions, and in particular circumstances concerning the protection of vulnerable adults.

In the absence of appropriate friends, relatives, or unpaid carers, decision makers should instruct, consult and receive a written report from an IMCA, relating to the following circumstances:

- the provision of serious medical treatment or
- admitted to hospital, or proposed to move to another hospital, for a stay longer than 28 days
- placed by the NHS in a care home, or proposed to a move to a different care home, for a stay likely to be longer than 8 weeks

Decision makers have been granted the powers to consult an IMCA in adult safeguarding cases (even when the person has family, but where family members might not be acting in the persons best interests, or they do not have the capacity to do so, or the decisions are complex). The use of an IMCA in safeguarding cases should always be considered, with decisions recorded and evidenced on the MCA4 form.

Decision makers do not have a duty to instruct an IMCA for decisions about serious medical treatment which is to be given under part 4 of the MHA. Nor is there a duty to do so in respect of a move/change of accommodation, if the service user is required to move/change accommodation under the MHA.

6.5 Lasting power of attorney/enduring power of attorney

LPA came into effect from 1 October 2007, replaced the Enduring Powers of Attorney (EPA), and introduced new safeguards against abuse and exploitation. An EPA allows an attorney to make decisions solely about property and affairs, both before and after loss of capacity (or during periods of fluctuation) according to the person's wishes. EPA's signed prior to 1st October 2007, will remain valid after the introduction of the new LPA. New EPA's cannot be made after this time. The LPA must be executed in a prescribed form and it must be registered with the Office of the Public Guardian before it can be used. An LPA can only be made if the person has capacity to do so.

LPA's in relation to property, affairs and finance can be used either before or after the donor loses capacity, according to the donor's wishes.

LPA's in relation to personal welfare, healthcare and medical treatment, can only be used when the donor lacks capacity to make a decision in this respect.

When a patient or their representative makes known the existence of an LPA/EPA, employees must check it for validity and appropriateness. It is essential that a copy to be retained on the patient records. The copy should be dated and signed and placed in the poly pocket in the front of the notes along with capacity assessments.

If there is any concern that an LPA is being used not in the patients Best Interest this must be escalated to the Safeguarding Team who will consult with the Legal Team to revisit with the Court of Protection

Patients subject to the MHA are able to make a LPA if they have the capacity to do so. An attorney cannot consent to or refuse treatment for a mental disorder for a patient detained under the MHA.

An attorney is a person chosen personally by the patient. Employees are not permitted to act as an attorney during the course of their work. Employees who act as an attorney because of personal commitments (family or friendships), must inform their line manager to ensure there is no conflict of interest.

6.6 Court of Protection and the Appointment of Deputies

The Act established a new specialist court, known as the New Court of Protection, with a new jurisdiction to deal with decision making for adults who lack capacity. The court has power to make decisions about property and affairs and personal welfare (welfare and healthcare) matters. The Court of Protection has the powers to:

- Decide whether the person has capacity to make particular decisions for themselves.
- Make declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make such decisions.
- Appoint deputies to make decisions for people lacking capacity to make those decisions.
- Decide whether a LPA or EPA is valid, and
- Remove deputies or attorneys who fail to carry out their duties.

If a patient has not appointed or is unable to appoint an attorney (EPA/LPA) and they need certain protective decisions made on their behalf, which cannot be taken other than by bringing the matter to court, then an application will be made to the Court of Protection. In most cases, the patient's family or carers will make the application. Very occasionally, the Trust will make an application. For example, where no other appropriate person can be identified, or where there is a conflict between the family/carers and the rights/best interests of the patient.

Employees will abide by the procedures of the Court of Protection. Employees will use the guidance and procedures as defined within the Court of Protection Rules and Practice Directions issued by the Court.

Decision makers have a duty to make an application to the Court of Protection for a declaration that a proposed action is lawful before that action is taken in the following situations:-

- Decisions about the proposed withholding or withdrawal if artificial nutrition and hydration from patients in a permanent vegetative state;
- Cases involving organ or bone marrow donation by a person who lacks capacity to consent;
- Cases involving the proposed non-therapeutic sterilisation of a person who lacks capacity to consent to this; or
- All other cases where there is a doubt or dispute about whether a particular treatment will be in a person's best interests.

6.6.1 Court of Protection Section 49 Reports

Under section 49 of the MCA, the Court of Protection can order reports from NHS health bodies and local authorities when it is considering any question relating to someone who may lack capacity. An order under section 49 places an obligation on the NHS to comply, although it is up to the Trust to determine the appropriate person to complete the report. There is no right to charge for the preparation of the report.

The Safeguarding Team will act as the single point of access for requests for Section 49 Reports within the Trust.

Should any staff member receive any communication from Solicitors in relation to a request for a Section 49 Report they should immediately inform the Safeguarding team, noting the date of receipt.

The Standard Operating Procedure (See Appendices) will be utilised for Section49 Reports.

6.7 The Functions of the Public Guardian

The MCA introduces a statutory office, the Public Guardian. The Public Guardian is appointed by the Lord Chancellor. The functions of the Public Guardian are set out in Section 58 of the Act and include establishing and maintaining registers for LPA's and of Court of Protection orders appointing deputies. The Public Guardian also has the function of supervising deputies and directing visits by Court of Protection Visitors.

6.8 Paying for Goods and Services and the Handling of Money on Behalf of Service Users who Lack Capacity

Employees have a duty to ensure that a patient has the capacity to consent to the payment of chargeable services, prior to obtaining the consent and entering into the contract.

Occasionally, employees may be required to complete cash transactions on behalf of a patient who lacks capacity, to purchase 'necessary' goods. Employees are protected from liability if they are able to demonstrate that the action taken is in the best interests of the service user and that the necessary goods and services are purchased at a reasonable price.

'Necessary' is defined for the purposes of this policy as 'something that is suitable to the person's condition in life and their actual requirements when the goods or services are provided, with the aim of making sure that the person can enjoy a similar standard of living and way of life to those they had prior to loss of capacity' (s 7 of the Act and the Code).

6.9 Mental Health Act 1983 (as amended by Mental Health Act 2007)

The MCA section 28 provides that the Act does not apply to any treatment for a medical disorder given in accordance with the rules about compulsory treatment, as set out in Part IV of the Mental Health Act 1983.

The MHA sets out when:-

- people with mental disorders can be detained in hospital for assessment or treatment;
- people who are detained can be given treatment for their mental disorder without their consent; or when
- people with mental disorders can be made subject to guardianship or after-care under supervision to protect them or other people.

The Trust has a duty to consider using the MHA (as amended by the Mental Health Act 2007) to detain and treat someone who lacks capacity to consent to treatment if:-

- It is not possible to give the person the care or treatment they need without doing something that might deprive them of their liberty.
- The person needs treatment that cannot be given under the MCA.
- The person may need to be restrained in a way that is not allowed under the MCA.
- It is not possible to assess or treat the person safely or effectively without treatment being compulsory.
- The person lacks capacity to decide on some elements of the treatment but has the capacity to refuse a vital part of it.
- There is some other reason why the person might not get treatment, and they, or someone else might suffer harm as a result.

The Trust recognises that many people covered by the MHA have the capacity to make decisions themselves. Some however, will lack capacity:

- If the patient is liable to be detained under the MHA, decision makers cannot rely on the MCA to give mental health treatment or make decisions about that treatment. They must use the MHA.
- If the patient is liable to be detained under the MHA, and given mental health treatment without their consent, they can also be given mental health treatment that goes against an advance decision to refuse treatment.
- If a patient is subject to guardianship, the guardian has the exclusive right to make certain decisions, including where the service user is to live.
- IMCAs do not have to be involved in decisions about serious medical treatment or accommodation, if those decisions are made under the MHA.

However, the employees have a key role to play in supporting vulnerable people, including those who may lack capacity to make some decisions. Employees must take into consideration the five key principles of the MCA, even for patients who are liable for detention under the MHA.

Employees should never consider Guardianship as a way to avoid the MCA. They should determine whether they could achieve their aims without guardianship for service users that lack capacity, prior to making an application for Guardianship under section 7 of the MHA.

6.10 Deprivation of Liberty Safeguards (DoLS)

In some cases, patients may need to be deprived of their liberty for treatment or care because it is necessary in their best interests to protect them from harm. The DoLS apply to:

- people aged 18 and over; who
- suffer from a mental disorder; and
- lack the capacity to give consent to the arrangements made for their care or treatment in a care home or hospital, under public or private arrangements; and
- for whom a deprivation of liberty is considered, after an independent assessment, to be necessary and proportionate response in their best interests to protect them from harm; and
- detention under the MHA is not appropriate for the person at that time.

Employees must keep the five principles of the Act in mind at all times. For example, if a person is at risk of deprivation of liberty because they are subject to frequent, cumulative and ongoing restriction or restraint, consideration should always be given to less restrictive alternatives. This could include simple actions such as the implementation of a care plan incorporating visits from relatives, trips out and advocacy services. If this cannot be achieved, then you must apply for an authorisation under DoLS, in accordance with the policy **OP57 Deprivation of Liberty Safeguards**.

6.11 Advance Decisions to Refuse Treatment

Informed consent is a general principle of law and medical practice, that people with capacity have a right to consent to or refuse treatment. An advance decision enables someone with capacity to refuse specified medical treatment for a time in the future when they may lack capacity.

People can make an advance decision under the Act if they are 18 and over and have the capacity to make the decision. They must say what treatment they want to refuse, and they can cancel their decision (or part of it) at any time.

The Act imposes particular legal requirements and safeguards on the making of advance decisions to refuse life-sustaining treatment. To be valid, an advance decision must be in writing, be signed and witnessed and state clearly the decision applies even if life is at risk. It is the responsibility of the person making the advance decision to ensure that it is valid. Advance decisions to refuse treatment for mental disorder may not apply if the person who made the advance decision is or is liable to be detained under the MHA.

It is the responsibility of the person making the advance decision to ensure it will be drawn to the attention of healthcare professionals when it is needed. Employees must record the existence of a valid advance decision within the patient's record. They must make the existence of the advance decision known to other healthcare professionals.

6.12 Protection from Abuse

The word abuse covers a wide range of actions. In some cases, abuse is clearly deliberate. However, abuse sometimes happens because somebody does not know how to act correctly – or they do not have appropriate help and support. Abuse should generally be regarded as behaviour which violates or could violate the human or civil rights of an adult with needs for care and support. This includes sexual, physical, verbal, financial and emotional abuse. Some abuse will be a criminal offence. It is important to prevent abuse, wherever possible.

If there are allegations that somebody is being abused, it is important to investigate the abuse, confirm that abuse is occurring and take steps to stop it happening. Employees must follow the appropriate safeguarding policies, processes and procedures when they suspect abuse has or is taking place (see Safeguarding Adults from Abuse Policy OP75d).

The Fraud Act 2006 creates a new offence of 'fraud by abuse of position'. The offence may apply to a range of people including attorneys, deputies, receivers and appointees, if they dishonestly abuse their position, intend to benefit themselves or others, and cause loss, or expose a person to the risk of loss.

6.13 Research Involving People who Lack Capacity

The Act contains provisions for the authorisation and regulation of research (including medical research), involving people who lack capacity to consent to their participation. The Act excludes Clinical Trials of Medicines as this is covered within the Medicines for Human Use (Clinical Trials) Regulations 2004. The Trust has a duty to act in accordance with the principles and provisions of the Act and to have regard to the guidance given in the Code of Practice.

The Act does not provide a specific definition for 'research'. Research is therefore defined for the purposes of this policy as "an attempt to derive generalisable new knowledge by addressing clearly defined questions with systematic and rigorous methods"* *(*Department of Health Research Governance in Social Care Advisory Group April 2005).*

The Trust recognises the importance of research and the involvement of those who may lack capacity. Without it, we would not improve our knowledge of what causes a person to lack or lose capacity, and the diagnosis, treatment, care and needs of people who lack capacity.

Employees will adhere to the rules for research that includes people who lack capacity to consent to their involvement, as detailed within the Act. These include-

- when research can be carried out,
- the ethical approval process,
- respecting the wishes and feelings of people who lack capacity,
- how to engage with a person who lacks capacity, and
- how to engage with carers and other relevant people

The Trust recognises that intrusive research, which does not meet the requirements of the Mental Capacity Act 2005, cannot be carried out lawfully in relation to people that lack capacity.

The Trust will only consider proposals for the approval of research involving service users that lack capacity, if the research is linked to:-

- an impairing condition that affects the person who lacks capacity, or
- the treatment of that condition and
- there are reasonable grounds for believing that the research would be less effective if only people with capacity are involved and
- the research project has made arrangements to consult carers and to follow the other requirements of the Act.

The research must also meet ***one*** of two additional requirements prior to consideration:-

1. The research must have some chance of benefiting the person who lacks capacity and the benefit must be in proportion to any burden by taking part, or

2. The aim of the research must be to provide knowledge about the cause of, or treatment or care of people with, the same impairing condition – or a similar condition. The risk to the person who lacks capacity must be negligible, there must be no significant interference with the freedom of action or privacy of the person who lacks capacity and nothing must be done or in relation to the person who lacks capacity, which is unduly invasive or restrictive

Employees who wish to conduct research have a statutory duty to obtain formal approval prior to the commencement of the research. Retrospective approval is required for all research projects that are incomplete as at the date of issue of this policy. This will include:

- obtaining the views of any carers and other relevant people before involving a person that lacks capacity in research;
- respecting the wishes and feelings of the person;
- placing more importance on the service user's interests than the public interest of science and medicine.

6.14 Confidentiality

People making decisions on behalf of those who lack capacity will often need to share personal information relating to the person lacking capacity, so that they can determine, and act in, that person's best interests. Employees must act upon such requests to disclose personal information in accordance with the law. Disclosure of, and access to, such information is regulated by the Data Protection Act 1998, other Acts (e.g. Crime and Disorder Act, Criminal Justice Act 2003); The common law duty of confidentiality; professional codes of conduct on confidentiality; information sharing protocols; The Human Rights Act 1998 and European Convention on Human Rights.

The Trust will comply with its legal duty to release information requested under a LPA for financial affairs, or personal welfare or EPA (in accordance with the Data Protection Act 1998).

The Public Guardian has the authority to examine and take copies of any health record. The Trust will comply with all reasonable and relevant requests when required to do so and will ensure that an appropriate record is maintained of requests to disclose information.

6.15 Resolving Disagreements and Disputes

It is in everybody's interests to settle disagreements and disputes quickly and effectively. There are different options available for the settling of disagreements in relation to: -

- a person's capacity to make a decision,
- their best interests,
- a decision someone is making on their behalf, or
- or an action someone is taking on their behalf.

Some disagreements about healthcare are so serious that the Court of Protection can only resolve them; others can be resolved by either formal or informal procedures. The Trust will work with the complainant to select the most suitable option(s) to attempt to resolve the dispute or disagreement as quickly and fairly as possible. The options available are-

- Involve an advocate to act on behalf of the person who lacks capacity to make the decision.
- Get a second opinion.
- Hold a formal or informal 'best interests' case conference.
- Mediation.
- Pursue the complaint through Gateshead Health NHS Foundation Trust Complaint Procedures.
- Referral to the Office of the Public Guardian for disputes regarding the finances of a person who lacks capacity.
- Application to the Court of Protection for a decision maker to be appointed in cases where there is no other way of resolving the matter.

7 Training

Level	Delivery	Trainer
Level 1 – Alerting staff to the existence of the Mental Capacity Act and Deprivation of Liberty Safeguards.	Trust Mandatory Training Day via Safeguarding Adults presentations and during Day 2 and Day 3 of Trust Induction Programme via Safeguarding Adults presentations.	Safeguarding Adults Team
Level 2 –Awareness Session.	On Day 3 of the Trust Induction Programme.	Safeguarding Adults Team
Level 3 – Full training session for trained/registered staff.	Joint training sessions available via Gateshead Council.	Outside trainer provided by Gateshead Council

8 Diversity and inclusion

The Trust is committed to ensuring that, as far as is reasonably practicable, the way we provide services to the public and the way we treat our staff reflects their individual needs and does not discriminate against individuals or groups on the grounds of any protected characteristic. This policy promotes equality and human rights by providing healthcare professionals, carers and patients with an understanding about assessing capacity and making decisions in the patient's best interests, where they lack the capacity to do so because of an illness, injury or disability. This policy has been appropriately assessed.

9 Monitoring compliance with the policy

Standard / Process / Issue	Monitoring and Audit			
	Method	By	Committee	Frequency
The principles of best practice as set out in the Mental Capacity Act 2005 will be embedded into the practice of all employees within the organisation.	Monitoring will include an annual audit of compliance with the Mental Capacity Act and will include the completion of appropriate documentation and communication between relevant professionals.	The audit will be carried out by the the Safeguarding Team	Safeguarding Committee	Yearly

10 Consultation and review

This policy has been reviewed against the Mental Capacity Act 2005 and the Code of Practice 2007. Comments from Divisional and Assistant Divisional Manager, Mental

Health Clinical Lead, Mental Health Lead Professionals and Equality and Diversity Officer have been invited.

11 Implementation of policy (including raising awareness)

This policy will be implemented in accordance with policy OP27 “Policy for the development, management and authorisation of policies and procedures” and policy training will be included in the programme of training as detailed in section 7.

12 References

Mental Capacity Act 2005
Mental Capacity Act Code of Practice 2007.
Mental Health Act 1983 (as amended in 2007)

13 Associated documentation

Care Standards Act 2000
Data Protection Act 1998
Disability Discrimination Act 1995
Human Rights Act 1998
National Health Service and Community Care Act 1990
OP25 Advance Decision to Refuse Treatment
OP75d Safeguarding Adults from Abuse
OP57 Deprivation of Liberty Safeguards Policy

Mental capacity decision-making process

Start from the assumption that the person has the capacity to make the decision.

Remember!

Someone who can't make complex decisions could still make simple decisions, such as what to eat or wear.

Assessment must be about that particular decision and not about a range of decisions.

An assessment will usually include the person's family, friends and carer, or an Independent Mental Capacity Advocate (IMCA) if one has been appointed.

Assessment

1. Is there a permanent or temporary impairment of, or disturbance in, the functioning of the person's mind?
2. If yes, does the impairment mean that the person is unable to make this decision?

Remember!

Mental capacity assessment should be a conversation with the person, not a strict test!

The person is unable to make the decision if, after they have had all appropriate help and support, they can't:

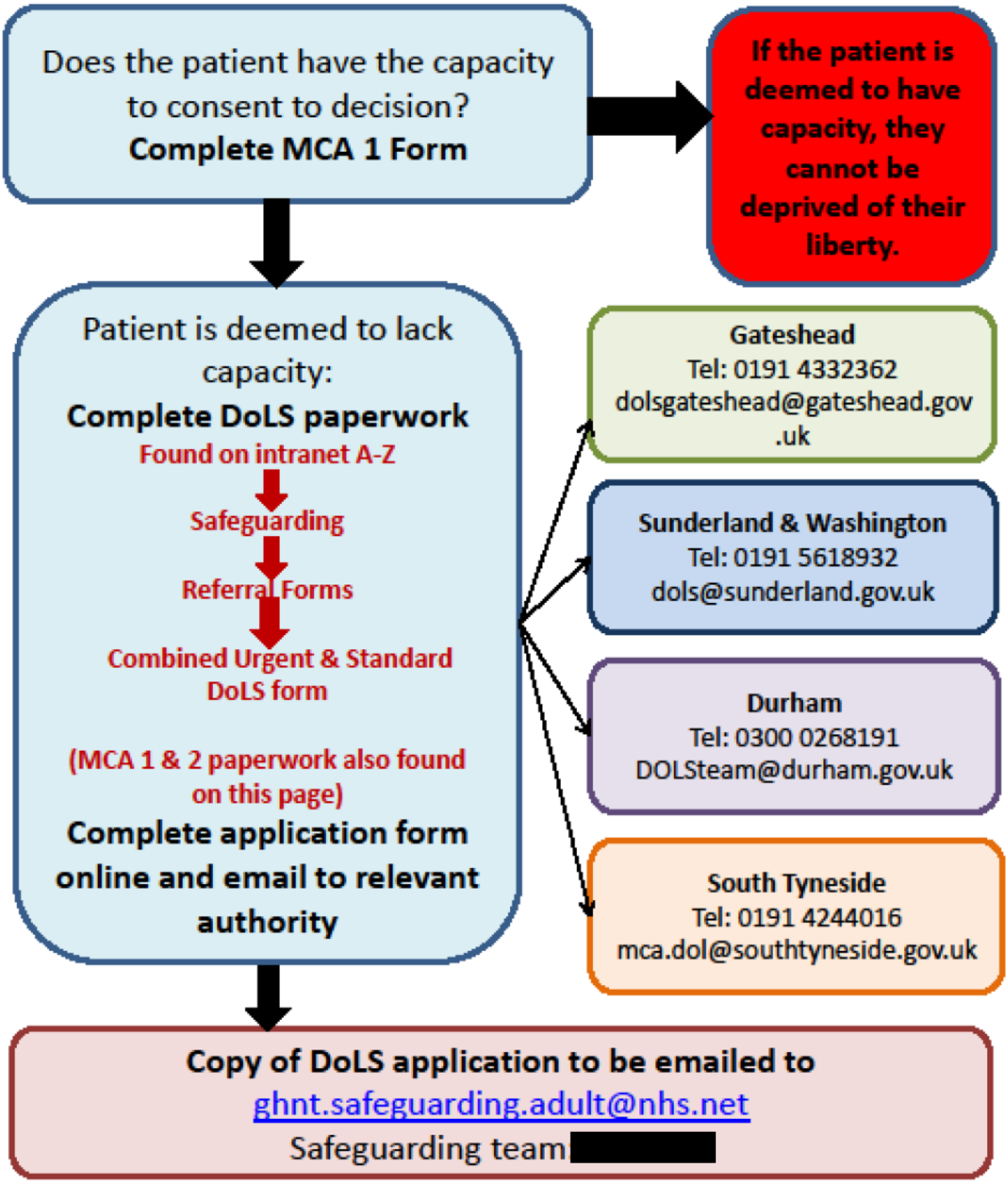
- understand information about the decision and the consequences of making it
- retain information about the decision
- use the information as part of the decision-making process
- communicate their decision by any means.

Person has capacity and can make the decision – even if their decision seems strange or eccentric.

Person does not have capacity, so you must make the decision in their best interests.

DoLS : Deprivation of Liberty Safeguards

Referral process for QEH patients



Appendix 1

Mental Capacity Act 2005

Form MCA1
Record of a Mental Capacity Assessment

Gateshead Council
www.gateshead.gov.uk

For further guidance, please refer to chapters 2 and 3 of the Mental Capacity Act 2005 Code of Practice.

Name of person being assessed	**Date of Birth**
Assessment start date	

This assessment *must* adhere to the principles of the Mental Capacity Act:-

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

What is the decision that the person needs to make?

Be specific, relate it to the person and try to capture it in one sentence

Does this decision need to be taken now?

Can it be delayed? Is there a likelihood of the person regaining capacity? What is the timescale for making this decision?

What is the information relevant to this decision?

What is the nature of the decision? Why is the decision needed? Who requires it? What choices are available? What are the likely consequences of or risks involved in deciding one way or another, or making no decision at all?

Is there an impairment of, or disturbance in the functioning of the person's mind or brain?

E.g. dementia, delirium, acquired brain injury, mental illness, learning disability, phobia, confusion, drowsiness or loss of consciousness due to a physical or medical condition, treatment, or because drunk or under the influence of drugs. Summarise how you have reached your conclusion. Give the source of the information e.g. medical reports, social work records, information from family or carers, your own observations or professional judgement etc. Indicate whether the impairment is temporary or permanent.

If you have answered ***No*** to the last question, then **the person cannot lack capacity** within the meaning of the Mental Capacity Act 2005. Go straight to the **Outcome of assessment** section at the end of this form, record that the person has capacity and the decision that they have made, then sign and date this form.

How have you planned this assessment?

Summarise what consideration you have given to the timing of your assessment – you may need to visit more than once, at different times of the day or at different venues. The person's communication needs – verbal, non- verbal, is a translator needed? Will photographs, cue cards etc be helpful and if so are they available? The involvement of others in the assessment – professionals, family, friends, advocates etc. The best way to present the relevant information – e.g. without unnecessary complication; supported by written materials if appropriate; on more than one occasion

1 Do you consider the person able to understand the information relevant to the decision to be made?

Summarise how you reached your conclusion by reference to the relevant information and the circumstances under which you discussed it with the person.	**Yes**	**No**

2 Do you consider the person able to retain the information for long enough to use it in order to make the decision?

Most decisions require a person to be able to retain the information for a short time only. Significant or more difficult decisions may require the person to retain the information over several days. Summarise how you reached your conclusion by reference to the relevant information and the circumstances under which you discussed it with the person.	**Yes**	**No**

3 Do you consider the person able to use or weigh that information as part of the decision-making process?

Was the person able to consider the advantages and disadvantages of possible outcomes? Were they able to adjust their position in the light of new information? Summarise how you reached your conclusion by reference to the relevant information and the circumstances under which you discussed it with the person.	**Yes**	**No**

4 Do you consider the person able to communicate – verbally or non-verbally – their decision?

Summarise how you reached your conclusion with reference to the relevant information and the circumstances under which you discussed it with the person.	**Yes**	**No**

If you have answered **Yes** to ***all*** of questions 1 - 4 above, then the person is considered, on the balance of probability, to have the capacity to make this particular decision at this time.

If you have answered **No** to ***any*** of questions 1 – 4 above, then you have found that the person does not have the capacity to make this particular decision at this time.

Outcome of assessment

Select the relevant statement **(Tick)**

I do not believe that the person has the capacity to make this particular decision at this particular time.	
Unless there is a valid and applicable advance decision or another person has the authority to make this decision - *for example a Lasting Power of Attorney or a Court Appointed Deputy* - a decision will now be made following the best interests process (use form MCA2).	

Or

	(Tick)
I believe that this person has the capacity to make this particular decision at this particular time. The decision that the person has made is recorded below	

Details of those consulted/ involved in this assessment

Name	**Role/Relationship**	**Views**

Signature of assessor: **Date:**

Name and Job Title: **Contact Details:**

THIS ASSESSMENT IS VALID FOR THE DECISION INDICATED AT THE TIME OF COMPLETION. CAPACITY MAY IMPROVE, PARTICULARLY WITH THE PROVISION OF POSITIVE SUPPORT, AND THIS WOULD THEN REQUIRE A REASSESSMENT

Appendix 2

Mental Capacity Act 2005

Gateshead Council
www.gateshead.gov.uk

Form MCA2
Record of actions taken to make a best interests decision under the **Mental Capacity Act 2005**

For further guidance, please refer to Chapter 5 of the Mental Capacity Act 2005 Code of Practice.

Name of person to whom this best interests decision relates	**Date of Birth**
Assessment start date	

This process *must* adhere to the principles of the Mental Capacity Act:-

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

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

What is the decision that needs to be made?

Be specific, relate it to the person and try to capture it in one sentence

Has the Person been determined as lacking capacity to make this particular decision at this time?

	Yes	Give details of when the capacity assessment was completed and where it is recorded
	No	You cannot proceed to make a best interests decision. Complete **form MCA1** to determine whether the person has capacity to make this decision.

To the best of your knowledge, are any of the following in place?

	Yes/No	
Advanced Decision to Refuse Treatment {ADRT}		If a capacitous person over 18 has made a valid and applicable decision to refuse treatment, it cannot be overruled. Doubts about validity must be determined by the Court of Protection
Registered Lasting Power of Attorney – Personal Welfare		Unless restrictions or conditions have been added, the attorney/s can make decisions in the person's best interests about residence, contact, day-to-day care, medical treatment, care packages, social or educational activities, correspondence and papers, access to personal information and complaints.
Registered Enduring Power of Attorney or Registered Lasting Power of Attorney – Property and Affairs		Unless specifically restricted, the attorney can make decisions in the person's best interests about buying/selling property, banking, benefits, pensions, rebates, income, inheritance, tax, mortgages, rent, household expenses, insurance, maintenance of property, investments, repaying loans, payment of medical or care fees, purchasing vehicles, equipment or any other help the person needs.

Court Appointed Deputy		Check whether the Deputy has been appointed to manage Property and Affairs or Personal Welfare and what remit/restrictions the Court has placed on their deputyship
N.B. Do not proceed any further with this best interests decision if you have identified that it comes under the remit of one of the above. However, if you believe that an attorney/ deputy is not acting in the person's best interests, you should raise your concerns as a Safeguarding alert and with the Office of the Public Guardian.		

Who is making this Best Interests Decision?

The Decision Maker is the person or body who will take action following the decision. There may be different views, and it is the responsibility of the Decision Maker to listen and weigh up all of these views before reaching the Best Interests Decision.

Decision Maker's Name		**Role**	

Where practical and appropriate you should consult: anyone previously named by the person as a person to be consulted in decisions of this kind, anyone engaged in caring for the person, close relatives, friends or others who take an interests in the person's welfare, any attorney or Court appointed deputy and any other relevant person

IMCA Instruction

If the incapacitated person **has no friends or family who it would be appropriate to consult** as part of the decision making process, there are certain situations in which the Decision Maker must or may need to instruct an IMCA

Is this decision about	**Yes/No**	
Serious medical treatment providing, withholding or stopping		If yes, you have a statutory duty to instruct an IMCA and **must** do so.
Accommodation A Local Authority or NHS organisation proposes to place the person in accommodation - or move them to different accommodation - for a period likely to exceed 8 weeks (or which has turned out to be for more than 8 weeks) or An NHS organisation proposes to place the person in hospital – or move them to another hospital - for longer than 28 days (or a period which has turned out to be more than 28 days)		If yes, you have a statutory duty to instruct an IMCA and **must** do so.
A care review Relating to decisions about accommodation		If yes, you should instruct an IMCA if you believe it will be of benefit to the person
Safeguarding adults proceedings the incapacitated person may be the adult at risk or the alleged perpetrator		If yes, you should instruct an IMCA if you believe it will be of benefit to the person ***even if they have family or friends***
If you have answered **yes** to any of the statements above, but **do not** intend to instruct an IMCA, please give your reasons below e.g. the person has an appropriate friend/family member to support them, action needs to be taken urgently and cannot be delayed etc.		

List the options that are being considered (add more boxes as needed)

Option 1	
Definite advantages e.g. benefits for the person; less restrictive	**Definite disadvantages** e.g. risks, cost, effect on relationships, restrictive
Possible advantages	**Possible disadvantages**

Option 2	
Definite advantages e.g. benefits for the person; less restrictive	**Definite disadvantages** e.g. risks, cost, effect on relationships, restrictive
Possible advantages	**Possible disadvantages**

Option 3	
Definite advantages e.g. benefits for the person; less restrictive	**Definite disadvantages** e.g. risks, cost, effect on relationships, restrictive
Possible advantages	**Possible disadvantages**

The boxes below capture the checklist of 7 factors that the Decision Maker must always consider when reaching a Best Interests Decision, as set out in Section 4 of the Mental Capacity Act 2005. No one factor will always be more important than another and the weight to be given to each will differ depending on the individual circumstances of the case.

1 Show equal consideration and non discrimination

Confirm that you have not made assumptions about what is in the person's best interests purely on the basis of their age, appearance, condition or behaviour.

2 Consider all relevant circumstances

What would the person be likely to consider if they were making the decision? E.g. beliefs, values, priorities, benefit to a third party

3 Encourage and enable the person's participation throughout the decision making process

What has been done to encourage the person to take part, or improve their ability to take part?

.

4 Consider whether the person can regain capacity

Is there a likelihood of the person regaining capacity? If so, when, and can the decision be delayed?

5 Is the decision about life sustaining treatment?

If it is, confirm that your decision is not be motivated by a desire to bring about the person's death, and demonstrate that you have not made assumptions about the person's quality of life.

6 Take into account the person's past and present feelings about this decision

What has the person previously expressed verbally, in writing or through their behaviours and habits? What are their beliefs and values (e.g. religious, cultural, moral or political)?

7 Take the views of others into account

What are the views of the carer/family/friends?

Name & Relationship	Summary of views

What are the views of professionals involved in the person's care?

Name & Role	Summary of views

If it was not practicable to consult any relevant person(s), state who, what efforts were made to consult them, or why it was decided not to

What are the views of the IMCA if one is involved?

Reference the IMCA's written report, whether you have accepted or rejected their views, and why.

Name & Role	Summary of views

Are there any areas of disagreement?

is important to capture and consider opposing views, however, the Decision Maker alone is responsible for making the decision, and does not need universal agreement. If there is strong disagreement, seek advice from the MCA Coordinator or your legal rep.

What is the decision you have reached in the person's Best Interests?

State clearly the decision and explain your rationale for reaching it reference to the 7 factors and the views of the relevant persons you have consulted,

Signature of Decision Maker:

Date:

Date decision will be reviewed:

Appendix 3

What are section 49 reports?

In essence they are a report prepared in respect of a patient who may lack capacity.

Under section 49 of the Mental Capacity Act 2005 (MCA), the Court of Protection can order reports from NHS health bodies and local authorities when it is considering any question relating to someone who may lack capacity and the report must deal with 'such matters as the court may direct.'

An order under section 49 of the MCA does place an obligation on the NHS trust to comply, although it is for the trust to determine the appropriate person to complete the report. There is no right to charge a fee for preparing a section 49 report.

We are aware that section 49 reports are currently being requested on a frequent basis, often from trusts which have had no previous dealings with P. It seems that some organisations see it as a way to obtain an independent expert report on the person who lacks capacity without having to pay for it.

Obligations to report

In a recent Court of Protection case of RS -v- LCC and others [2015] EWCOP 56 the judge dismissed 10 arguments put forward by the NHS Trust that it should not be required to provide a report and affirmed the wide-ranging power of the court to order reports. This judgment is not binding which means that it does not force the conclusion that section 49 orders made in all cases will be appropriate. However, it is likely be persuasive in other similar cases.

The court has wide powers to call for section 49 reports but these requests are not always directed to the appropriate statutory body. It is possible to challenge an order requiring a section 49 report but you need to engage with the court process in order to do so.

One very important factor should be the consideration of who is the most appropriate statutory body to complete the report. When seeking to deal with cases fairly and proportionately, the court should consider whether there is a public body which already owes a statutory duty to assess and meet the identified needs of that person.

We have successfully challenged orders directing NHS trusts to provide reports under section 49 on the grounds that that trust is not the correct statutory body to carry out that assessment. In some cases, the order has been revoked so the NHS trust has not had to provide any report at all. In other cases the scope of the report has been significantly reduced.

Top tips for dealing with section 49 reports

1. Practice direction 14E sets out some of the requirements for section 49 reports.
2. The court should send an order under section 49 to a 'senior officer' of the trust. We suggest identifying someone to receive the orders so that they can allocate the requests to the appropriate person and monitor how many requests are received.

3. When you receive a request to provide a section 49 report you have seven days to nominate an appropriate person to complete the report and notify the court of this.
4. Check whether the subject of the report is someone you are currently providing services to – if not, consider whether you are the correct body to provide the report.
5. If you want to challenge the order you need to make an application to the Court of Protection for it to be amended – don't just ignore it!
6. If you do decide to provide the report then the nominated person is able to examine and take copies of:
    - Any health records
    - Any social care recors
    - Any care records

Appendix 4

Section 49 Reports

Standard Operating Procedure for the Management of Mental Capacity Act 2005 (MCA) Section 49 Reports

Section 49 Reports

Standard Operating Procedure for the Management of Mental Capacity 2005 (MCA) Section 49 Reports

1. Aim

The purpose of this Standard Operating Procedure is to set out a clear process within the Trust for receiving and processing Mental Capacity Act 2005 (MCA) Section 49 Report requests.

All requests should be received by or redirected to the Safeguarding Team.

2. Background

Under section 49 of the MCA, the Court of Protection can order reports from NHS health bodies and local authorities when it is considering any question relating to someone who may lack capacity. An order under section 49 places an obligation on the NHS to comply, although it is up to the Trust to determine the appropriate person to complete the report. There is no right to charge for the preparation of the report.

3. Scope

This Standard Operating Procedure applies to all staff working within the Trust, whether employed by the Trust or not; who are involved in handling patient, service user and staff personal information.

4. Link to overarching policy and/or procedure

Access to Health Records Policy

5. Procedure

The Safeguarding Team will act as the single point of access for requests for Section 49 Reports within the Trust.

Should any staff member receive any communication from Solicitors in relation to a request for a Section 49 Report they should immediately inform the Safeguarding team, noting the date of receipt.

5.1 Request for Section 49 Report

- Requesting Solicitors should contact the Trust in advance of requesting a Section 49 Report to discuss the requirements and discuss a timescale for the completion of the Report (generally this is 6 weeks) from the date of receipt by the Trust.

- The requesting Solicitor should issue a Draft Letter of Instruction and an Order (unsealed – but which is binding) to the Trust.

- On receipt of the Draft Letter of Instruction the Safeguarding team will acknowledge receipt of the request in writing.

Logging and processing the Request

- The Safeguarding Team will Log the request on the Section 49 spreadsheet (Safeguarding Shared Drive) and will undertake system checks, including archives, to establish what services the patient has had involvement with, if any.

- The request, along with the above information, will then be assessed by Safeguarding Leads to:-

  a. Assess who the most appropriate person is to complete the Section 49 Report.
  b. Identify the time scale within which the trust will complete the Section 49 Report.
  c. Inform the requestor of non-engagement and close the request.

- The Safeguarding Team will, **within 7 days**, of the date of receipt, notify the requesting Solicitor, in writing, of the timescale within which the Trust will complete the Section 49 Report.

- The Safeguarding Team will allocate the Section 49 Report to the person assessed as the most appropriate staff member and will provide the timescale for the completion of the Section 49 Report (1 week in advance of the completion date).

- The Safeguarding Team will, half way through the timescale, contact the allocated staff member to ascertain if the Section 49 Report is on track for the completion date.

5.2 Order from the Court

- The sealed Order from the court will be issued to the Trust which will outline the requirements for the Section 49 Report and will provide the timescale within which the Trust must comply with providing the Section 49 Report to the court.

- The Safeguarding Team will log receipt of the sealed Order.

- The Safeguarding Team will notify the author of the receipt of the signed order including any amendments.

5.3 Approval of Final Reports

- The report author will provide a word e-copy of the Section 49 Report to the Safeguarding Team by the date requested (one week in advance of the completion date) on Trust headed paper and penned signature.

- The final Section 49 Report will be sent to the Safeguarding Team for release.

- The Safeguarding Team will retain copies of all documents released.

For further information see Appendix1 and Practice Direction Guidance (attached)

Appendix 5

PRACTICE DIRECTION – ADMISSIONS, EVIDENCE AND DEPOSITIONS

This practice direction supplements Part 14 of the Court of Protection Rules 2007

PRACTICE DIRECTION E – SECTION 49 REPORTS

General

1. Attention is drawn to:
   (a) section 49 of the Act – which makes provision for the court to require a report dealing with such matters relating to P as the court may direct;
   (b) rule 85(2)(a) – which provides that the court, when giving directions, may require a section 49 report and give directions about any such report;
   (c) rule 117 – which sets out the duties of a person required to prepare a section 49 report and specifies to whom the report may be sent; and
   (d) rule 118 – which makes provision for the court to permit written questions to be put to a person who has made a section 49 report.

The court's direction for a report

2. The Annex to this practice direction contains the form of an order requiring a report under section 49 of the Act and the forms of directions relating to the report. When requiring a section 49 report, the court will as far as possible base its order and directions on those forms.

Reports by Public Guardian or a Court of Protection Visitor

3. Where a report is to be prepared by either the Public Guardian or a Court of Protection Visitor,[1] a copy of the order and the directions will be sent to the Public Guardian.
4. In the case of a report which is to be made by a Court of Protection Visitor, the Public Guardian must ensure that:
   (a) a person is nominated from the panel of General Visitors or the panel of Special Visitors, as appropriate; and

[1] See section 49(2) of the Act.

   (b) the court is notified of his name and contact details as soon as practicable.

5. The nomination of a Court of Protection Visitor should be made before the end of the period of 7 days beginning with the date on which the Public Guardian received a copy of the order.

Reports under arrangements made by a local authority or an NHS body

6. Where a report is to be prepared under arrangements made by a local authority or an NHS body,[2] a copy of the order and the directions will be sent to a senior officer of that authority or body. That person must ensure that:

(a) an appropriate person is nominated to make the report; and
(b) the court is notified of his name and contact details as soon as practicable.

7. The nomination should be made before the end of the period of 7 days beginning with the date on which the senior office of that local authority or NHS body received a copy of the order.

Access to information

8. The court will generally provide to the person who is to produce a report:
(a) a copy of the application form and any annexes to it;
(b) the name and contact details of P;
(c) the name and contact details of the parties; and
(d) the name and contact details of any legal representative of a person specified in (b) or (c).
9. The court order requiring the report, the directions relating to it and the information described in paragraph 8 will generally be sent by first class mail or by facsimile. If the circumstances warrant a different form of communication, the documents and information will also be sent by first class mail or by facsimile at the first available opportunity.

[2] See section 49(3) of the Act.

10. Section 49(7) of the Act sets out other documents relating to P which the Public Guardian or a Court of Protection Visitor may examine or of which he may take copies for the purpose of making the report.

The contents of the report

11. The person required to prepare a section 49 report must:
(a) prepare it having regard to the provisions of rule 117;
(b) produce it in the manner specified in this practice direction (subject to any directions given by the court); and
(c) produce it in accordance with the timetable set out in the court's directions.

12. The report should contain four main sections. These are:

(a) the details of the person who prepared the report;
(b) the details of P;
(c) the matters and material considered in preparing the report; and
(d) the conclusions reached.

13. In the first section (details of the person who prepared the report), the report should:

(a) state the full name of the person who prepared the report;
(b) state whether he was appointed under section 49(2) or (3) of the Act;
(c) state whether he is:
(i) the Public Guardian,
(ii) a General Visitor,
(iii) a Special Visitor,

(iv) an officer, employee or other person nominated by a local authority, or
(v) an officer, employee or other person nominated by an NHS body;

(d) state his occupation or employment (for example, social worker employed by a local authority or general practitioner in private practice); and
(e) list his qualifications and experience.

14. In the second section (P's details), the report should (unless an order to the contrary pursuant to rule 19 has been made):

(a) state P's full name, date of birth and present place of residence;
(b) state P's nationality, racial origin, cultural background and religious persuasion (if appropriate);
(c) identify P's immediate family (specifying their relationship to P and contact details);
(d) identify any other person who has a significant role in P's life (for example, a close friend or a carer) specifying their role and contact details; and
(e) give a summary of P's medical history.

15. In the third section (matters and material considered), the report should:

(a) list any interview conducted with P (specifying time and place);[3]
(b) list any interview conducted with one or more persons other than P (specifying time and place);[4]
(c) state:
(i) whether any examination of P was conducted by a Special Visitor under section 49(9) of the Act, and
(ii) the name and qualifications of any person who assisted with any such examination;
(d) give a summary of any key events in P's life which appear to have a direct bearing on the matters to be dealt with in the report;
(e) set out the details of any of the following material which was relied on in the preparation of the report:
(i) any literature or other material,
(ii) any records obtained under section 49(7) of the Act;
(f) set out the details of facts and opinions relied on in the preparation of the report (ensuring that there is a clear distinction between the two);
(g) where there is a range of opinion on an issue addressed in the report:
(i) summarise the range of opinion,
(ii) state the views held by the person who prepared the report and give reasons for them, and
(iii) if those views are qualified in any way, state the nature of the qualification; and
(h) indicate which of the facts are within the knowledge of the person who prepared the report.

16. In the fourth section (conclusions), the report should:

[3] The person preparing the report should ensure that he keeps any notes made during the interview with P, so that the notes are available for production to the court if necessary.

[4] The person preparing the report should ensure that he keeps any notes made during the interview with an person other than P, so that the notes are available for production to the court if necessary.

(a) identify any issues or questions which were specified in the directions given by the court as being matters in which the court had a particular interest;
(b) address clearly such issues or questions;
(c) state clearly all conclusions reached by the person who prepared the report;
(d) state clearly the recommendations made by the person who prepared the report; and
(e) contain a statement of truth in the following terms:

"I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are, and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion."

ANNEX

Order for section 49 report

Requirement for section 49 report

1. That in relation to case number [*insert case number*] a report is required under section 49 of the Mental Capacity Act 2005 in relation to [*insert name of P*].

Person required to prepare the report

2. The report must be prepared by [the Public Guardian] [a Court of Protection Visitor who is a General Visitor] [a Court of Protection Visitor who is a Special Visitor] [a person nominated by a local authority] [a person nominated by an NHS body].
3. [In the case of a report to be prepared by a Special Visitor, the Visitor may carry out in private a [medical] [psychiatric] [psychological] examination of P's capacity or condition].

Producing the report

4. [The report must be made to the court in writing]. [The report must be made orally to the court].
5. The report must be produced on or before [*insert date*].
6. [Where the report is made in writing, it must be delivered to the court by [first class post] [facsimile] [ ]].

Content of report

7. Subject to any directions given under the next paragraph, the report must contain all the material required by relevant practice direction and be prepared in the form there specified.
8. [The report need not address the following:
].

9. [The court is particularly interested in the following issues or questions and these must also be addressed in the report:
].

Persons to whom report is likely to be disclosed

10. At the time of ordering the report, it is the court's intention to disclose it under rule [117(4)] to [the parties only] [the parties and].

Other directions

11. [ ].