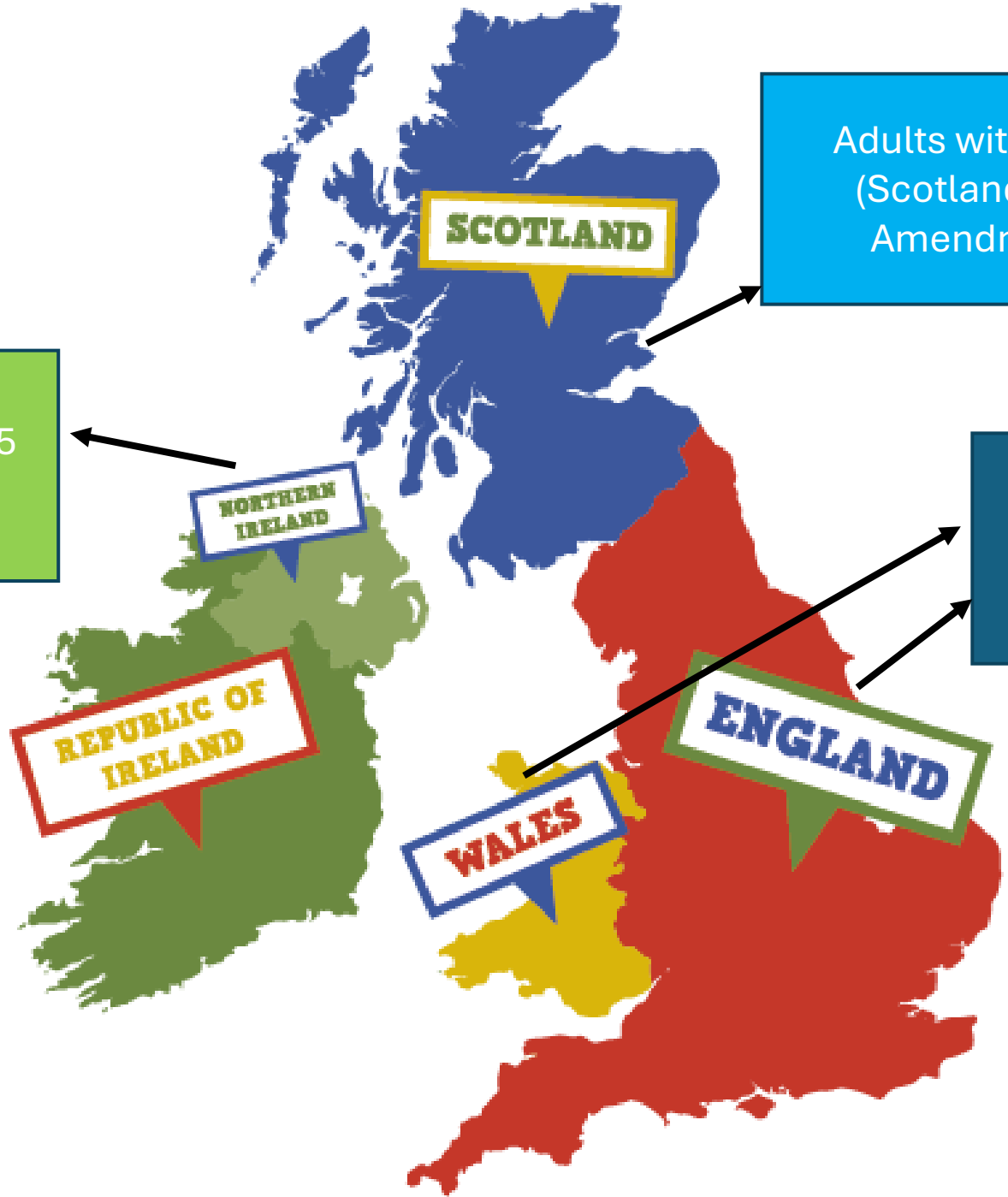
Capacity

Capacity

A person lacks capacity in relation to a matter if at the material time they are unable to make a decision in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain (MCA, 2005)



Adults with incapacity (Scotland) Act 2000 Amendment 2012

Mental Capacity Bill 2015 (Northern Ireland)

Mental Capacity Act 2005

Adults with incapacity (Scotland) Act 2000

- Framework for safeguarding welfare and managing the finances of adults who lack capacity due to mental illness, learning disability, dementia or a related condition or an inability to communicate
- Applicable to people over 16 years old

	Five Key Principles
1	Benefit
2	Least restrictive option should be chosen
3	Take into account the wishes of the person
4	Consultation with relevant others
5	Encourage the person to use existing skills and develop new skills

Consultation of others

- **Welfare Guardian** – Court appointed. Can make decisions about where a person lives, as well as about their personal and medical care. May be a relative or carer. Can also be court appointed social worker or local authority.
- **Financial Guardian** – Court appointment. Can make decisions regarding the property and financial affairs
- **Power of Attorney** – Appointed by person (Granter) before they loose capacity. Could related to finance, property and/or personal welfare. Granter specifies power given to attorney and specific coverage. Document completed, certified by a solicitor or a medical practitioner, then registered by the Office of the Public Guardian.
- Next of kin
- Family and friends
- Carers
- Other health and social care professionals

Medical intervention

- Assumption of consent unless impaired capacity

Lacks capacity:

- Emergency medical intervention can be given immediately – life saving
- Completion of section 47 certificate in non emergency

- Section 47 Certificate - certifies the incapacity in relation to decisions about particular medical treatments. The certificate can be issued for very short periods of time or for up to 36 months.
- Consultation with others, if refuse consent ask commission for and independent opinion from doctor
- Force cannot be used unless deemed necessary
- Registered medical practitioner or other authorised healthcare professional (dentist, ophthalmic optician, registered nurse who have necessary training)

Mental Capacity Act 2005

The Mental Capacity Act (MCA) 2005 sets out legislation relating adults who lack capacity in England and Wales

Provides a legal framework to 'promote and safeguard' decision making process

- Protect vulnerable adults
- Promote autonomy

- Applies to over 16 years old

(MCA, 2005; RCS, 2016)

	MCAs Five Key Principles
1	Presume capacity
2	All practicable steps must be taken to include person in decision making
3	Unwise decisions do not indicate lack of capacity
4	If a person lacks capacity, decisions must be made in their best interest
5	The least restrictive option should be chosen

(MCA, 2005)

Two Stage Capacity Assessment

Assessments of capacity is time and task specific

PART 1: Providing evidence

Does the person have an impairment of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works? (Can be temporary or permanent)

If so, does that impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made?

Impairment and disturbance of the brain can include:

- Acquired brain injury (stroke, dementia, trauma)
- Physical disabilities (inability to communicate wishes)
- Intellectual disabilities
- Mental health problems
- Substance misuse
- Dehydration
- Confusion, drowsiness, or delirium because of an illness or treatment
- Sensory deficits
- Impaired literacy
- **May not affect capacity and needs to be individually assessed**

(Kaul *et al.*, 2010b)

Two Stage Capacity Assessment

PART 2: Functional test

Can the person making the decision:

Understand information relevant to the decision

Retain the information long enough to make a decision

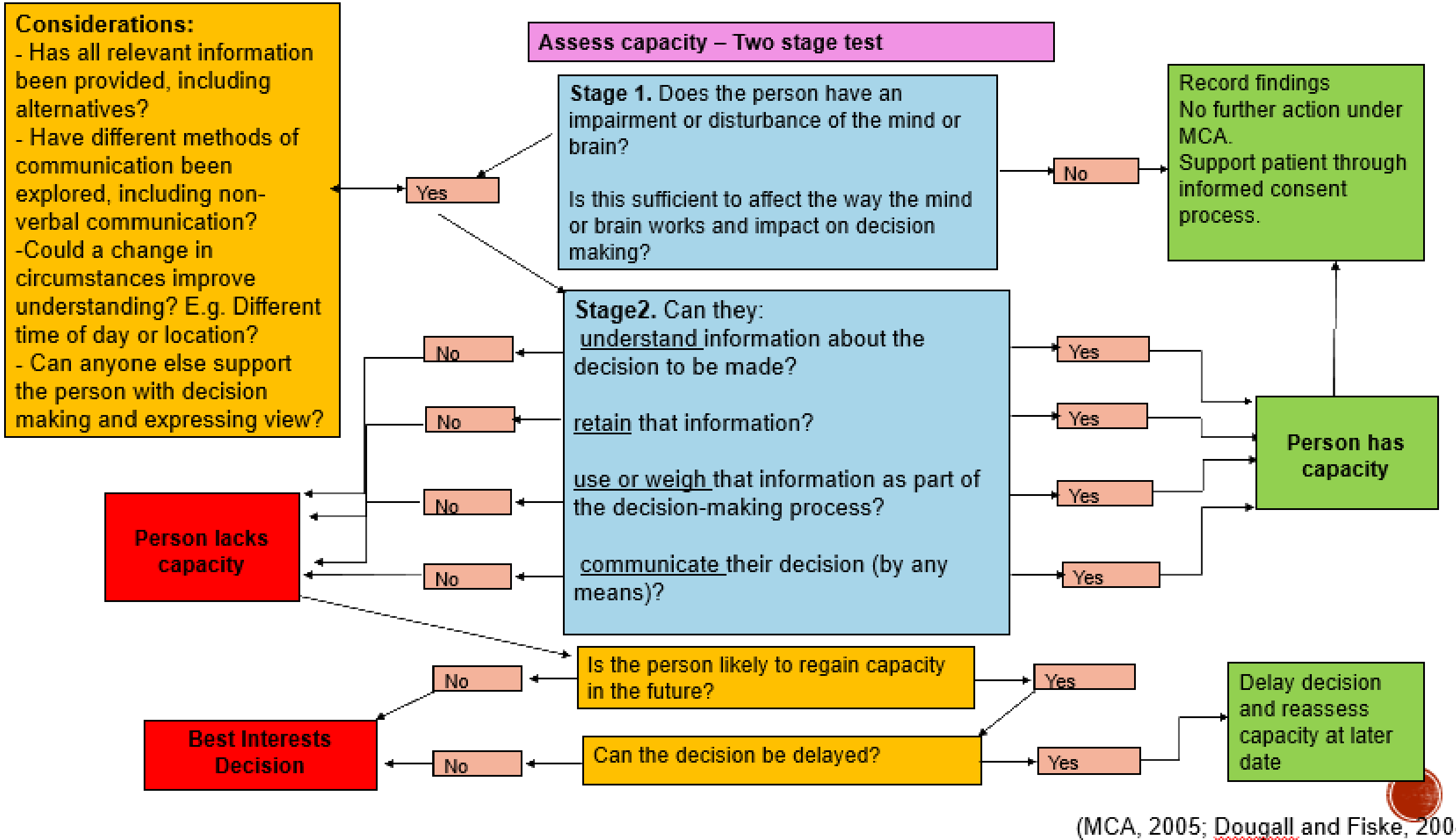
Use or weigh up that information as part of the decision-making process

Communicate a decision by any means practical

Capacity Assessment

- Avoid assumptions regarding capacity on patient's age, behaviour or appearance
- Having people present who are well known to the patient can facilitate communication, ease anxiety and increase co-operation (Kaul *et al.*, 2010a)
- A second opinion from other healthcare professionals may be beneficial in cases of fluctuating capacity, which must be re-assessed at each visit (Kaul *et al.*, 2010b)
- With fluctuating capacity, if treatment cannot be delayed, it is prudent to act in the patient's best interests

- Emergency treatment can be provided, that is immediately necessary to stabilise/prevent deterioration in the patient, without consulting others (MCA, 2005)



(MCA, 2005; Dougall and Fiske, 2008)

Best Interest Decisions

- Encourage participation of the person as far as reasonably possible

- Consult others who have an interest in the persons welfare
  - Family
  - Friends
  - Carers
  - Health care professionals
  - *Respect person's right to confidentiality*

- Find out person's wishes and beliefs that could influence the decision
- Avoid restricting the person's rights (Deprivation of Liberty Safeguards)

(MCA, 2005; Dougall and Fiske, 2008)

Best Interest Decisions

Decision maker – person/team proposing the treatment

Unless …

- **Lasting Power of Attorney (LPA)** for Health and Welfare
- **Advanced decisions**
- **Court Appointed Deputy**

For serious / complex dental treatment with only paid carers to help with the decision – instruct an **Independent Mental Capacity Advocate (IMCA)**

(MCA, 2005)

Office of the
Public Guardian

Helpline
0300 456 0300

Lasting power of attorney for health and welfare

Section 1
The donor

You are appointing other people to make decisions on your behalf.
You are 'the donor'.

Restrictions – you must be at least 18 years old and be able to understand and make decisions for yourself (called 'mental capacity').

Title: Mrs
First names: Ann
Last name: Other
Any other names you're known by (optional – eg your married name): N/A
Date of birth: Day 0 3 Month 0 8 Year 1 9 4 3
Address: 150 First Line Road
Town
County
Postcode: PO12 3RE
Email address (optional): N/A@N/A.com

Help?

For help with this section, see the Guide, part A1.

If you are filling this in for a friend or relative and they can no longer make decisions independently, they can't make an LPA. See the Guide 'Before you start' for more information.

For OPG office use only

LPA registration date: Day 15 Month 01 Year 2016
OPG reference number: 7000-0000-0001

Only valid with the official stamp here

LP1H Health and welfare (07.15)

Best Interests Meeting

Best interest meeting or case conference may be useful in some dental settings:

- Use of positive behavioural management
- Conscious sedation or GA
- Complex treatment planning including multiple extractions, soft tissue surgery, management of head and neck malignancy
- Management of dental emergencies including pain, sepsis, trauma or self-injurious behaviour

(Kaul *et al.*, 2010b)

Identify a decision maker

Is there an Advance Decision? Is it valid and applicable to the decision?

No

Yes

Respect decision/ refusal indicated

Does the person have a Lasting Power of Attorney? Are they health and welfare or property and affairs specific?

No

Yes

Is there a Court Appointed Deputy? Or Court of Protection?

No

Yes

Does the person have a close relative, friend or others who take an interest in their welfare?

No

Yes

Consult and if relevant to the decision - can authorise on final decisions

Referral for Independent Mental Capacity Advocate (IMCA)

Best Interests Decision Required

Anyone inserted in the person's welfare, including family, friends, carers and other healthcare professionals, should be consulted to ascertain:

- The person's past or present views in relation to the decision?
- Does the person hold any beliefs and values (e.g. religious, cultural, moral or political) that would be likely to influence the decision in question?
- Are there any other factors that the person themselves would be likely to consider if they were making the decision?
- Family and or carers' views about the person's best interests?
- IMCA's views, if appropriate.

In case of disagreement address locally in best interest meeting/ conference.
Apply for the Court of Protection to rule on the person's best interests if failure to resolve conflict.

A best interest conference/ meeting may be indicated:
For serious medical treatment/intervention
For arranging additional support to aid treatment
If there is conflict in decision making

Choose least restrictive option and document best interests decision

Best Interests Checklist / Report

- ✓Who has been involved
- ✓What the patient's wishes were before loosing capacity
- ✓Identify past dental history
- ✓How have you encouraged the person in the decision-making process?
- ✓What forms of communication have you used?
- ✓What information leaflets / aids have been given?
- ✓Is everyone in agreement with the decision?

Dental Anxiety and Phobia

- Can lead to inability to balance the risk and benefits of

procedures fairly (Muschik and Kallow 2015)

- May cause difficulty in processing relevant information immediately before a "stressful medical situation" (Schwartz-Arad *et al.*, 2006)

- Consent should be undertaken prior to the dental procedure, ideally separate to the treatment appointment and reconfirmed on the day (IASCD, 2015; SDCEP, 2017)

Barriers can be overcome by:

- Providing written information
- Discussions in the absence of the phobic stimulus once rapport and trust has been built with the patient (Muschik and Kallow 2015)

Case

- 60 year old male
- Referred for GA assessed ABUHB

MH: Autism

- Moderate LD
- Separation anxiety
- Urology problems

- Behaviour indicators of dental pain
- Dental GA 3 years previously

- IMCA instructed

Case conference:

- Dental team
- Anaesthetic input
- Key worker
- Care home manager
- IMCA

- Decision for clearance under GA

Deprivation of liberty safeguards (DOLS)

- Article 5 of the Human Rights Act - 'everyone has the right to liberty and security of person. No one shall be deprived of his or her liberty [unless] in accordance with a procedure prescribed in law'.
- DOLS is procedure prescribed in law where necessary to deprive a resident or patient, who lacks capacity, of their liberty in order to keep them safe from harm
- Part of Mental Capacity Act 2005
- Applies to over 18 year olds who lack capacity
- Applies to hospital and care homes

Acid Test:

- Is the person subject to continuous supervision and control? *and*
- Is the person free to leave?

When is dols needed?

Application for DOLs should be undertaken when:

- frequent use of sedation/medication to control behaviour
- regular use of physical restraint to control behaviour
- the person concerned objects verbally or physically to the restriction and/or restraint
- objections from family and/or friends to the restriction or restraint
- the person is confined to a particular part of the establishment in which they are being cared for
- the placement is potentially unstable
- possible challenge to the restriction and restraint being proposed to the Court of Protection or the Ombudsman, or a letter of complaint or a solicitor's letter
- the person is already subject to a deprivation of liberty authorisation which is about to expire

Practice example

Ben has learning disabilities and Prader-Willi syndrome. There are concerns about his health because his weight has been increasing steadily and now stands at 120kg.

Staff in his residential home have tried to support Ben to limit what he eats and to make healthy choices but with little effect.

Ben has been assessed as lacking capacity to make decisions about the amount and type of food he eats (this is common among people with Prader-Willi syndrome). It has been proposed that it is in Ben's best interests to stop him going into the kitchen, and always supervising him when out, to prevent him spending all his money on, or stealing, food. An application is made by the home manager for standard authorisation because they believe that the restrictions would deprive Ben of his liberty.

DOLS application

- The care home or hospital is the ‘managing authority’ – when they think they need to deprive someone of their liberty they need to ask for authorisation by ‘supervisory body’ – local authority
- Managing authority completes a form requesting a standard authorisation. The Supervisory body which has to decide within 21 days whether the person can be deprived of their liberty
- The supervisory body appoints assessors to see if the conditions are met to allow the person to be deprived of their liberty under the safeguards. They include:

❑The person is 18 or over

❑ Has a mental disorder

❑ Lacks capacity

❑ The restrictions would deprive the person of their liberty

❑The proposed restrictions would be in the person’s best interests

❑Whether the person should instead be considered for detention under the Mental Health Act

❑There is no valid advance decision to refuse treatment or support that would be overridden by any DoLS process

DOLS APPLICATION

- If any of the conditions are not met, deprivation of liberty cannot be authorised. This may mean that the care home or hospital has to change its care plan so that the person can be supported in a less restrictive way.
- If all conditions are met, the supervisory body must authorise the deprivation of liberty and inform the person and managing authority in writing. It can be authorised for up to one year.
- The person does not have to be deprived of their liberty for the duration of the authorisation. The restrictions should stop as soon as they are no longer required.
- Conditions on the standard authorisation can be set by the supervisory body. These must be followed by the managing authority.
- Standard authorisations cannot be extended. If it is felt that a person still needs to be deprived of their liberty at the end of an authorisation, the managing authority must request another standard authorisation
- Urgent authorisations can be made for up to 7 days (can be extended by 7 days if supervisory body agree)
- If in supported living or own home DoL in best interest through court of protection

Practice example

The local authority is following safeguarding proceedings for Mavis, a woman with dementia who is currently living at home with her husband. They are concerned her needs are not being met because her husband is refusing the support that is being offered. It is believed that he has untreated mental health needs. Mavis was assessed as lacking capacity to decide on her residence, though clearly communicates a wish to remain in her own home.

It has been proposed that a placement in a care home would be in Mavis's best interests. It is also believed that in the care home she will need a high level of restrictions to give her appropriate care and treatment.

Because the move is against Mavis's wishes and those of her husband, the local authority makes a fast-track application to the Court of Protection to make a decision in her best interests. If the court authorises a move to the care home, an application will be made by the home for a standard authorisation under the Deprivation of Liberty Safeguards.

Liberation Protection Safeguards (LPS)

- Replace Deprivation Liberty Safeguards (DOLS)
- Postponed to April 2022

Changes:

Apply to anyone >16 years

One scheme in all settings

No statutory definition ‘deprivation of liberty’

‘Supervisory body’ replaced with ‘Responsible body’

Three assessments – capacity, medical, necessary and proportionate

Annual renewal then every 3 years

Role of ‘approved mental capacity professional’ for complex cases

Summary

- Consent is a continuous process not a ‘one- off’ event
- Discussions and appropriate documentation are more important than a signature
- Capacity should be assumed and all practical means taken to promote autonomy
- Where a patient lacks capacity it is vital to involve those who know them best in decision making
- Treatment must be least restrictive option in best interest of the patient