



RHONDDA CYNON TAF

Community Care Division

Mental Capacity Act 2005

Staff Practice Guidance

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Contents	Page
1. What is Mental Capacity?	3
1.1 The 5 Core Principles of the Mental Capacity Act 2005	3
2. Who is the Decision-maker in Health and Social Care Services?	4
3. Best Interests Checklist	4
4. Recording Decisions About Capacity	5
4.1 Professional Staff	5
4.2 Care Assistant and Support Staff	6
5. When is an Assessment of Capacity Required?	6
6. Assessing of Capacity	6
6.1 How is Capacity Assessed?	7
6.2 Who Assesses Capacity?	8
6.3 Assessing Capacity in Practice	8
7. Sharing Information	9
7.1 Confidentiality	
8. Lasting Powers of Attorney (LPA)	10
8.1 What types of LPA are there?	10
8.2 Who can be an Attorney?	11
9. Court Appointed Deputies	11
10. Resolving Disputes	11
11. MCA Flowcharts	13

Mental Capacity Act 2005

Practice Guidance for Community Care Staff

Introduction

This practice guidance for community care staff is to be used in conjunction with the Mental Capacity Act 2005 Code of Practice and **should not** be treated as a stand-alone document. The full Code of Practice can be accessed via the RCT Intranet or by going to the Department of Constitutional Affairs website on:

<http://www.dca.gov.uk/menincap/legis.htm#codeofpractice>

1. What is Mental Capacity?

The Mental Capacity Act 2005 (MCA) defines mental capacity as the ability to make a decision about what we do, where we live, whom we see and what treatment we receive and so on.

The inability to make such decisions may be temporary or permanent and as a result of a range of factors that may impair or restrict our ability to make a decision.

Such factors are not confined to ongoing physical conditions such as dementia, learning disability, poor mental health and the effects of a stroke. Other factors will include being unconscious or barely conscious, under an anaesthetic, trauma and loss or being in intimidating or unfamiliar surroundings.

1.1 There are **five core principles** on which the MCA is based:

- 1. A person must be assumed to have capacity to make a decision unless it is proven otherwise**
- 2. A person is not to be treated as incapable of making a decision unless all efforts to help the person understand, retain, weigh and communicate their decision has been taken without success**

3. **Just because a person makes an unwise or unpalatable decision, this does not mean they are unable to make their own decisions**
4. **An act done, or decision made for or on behalf of a person who lacks the capacity to make a decision for themselves, must be done or made in their best interests**
5. **Before anything is done, or decision made, the decision-maker must consider how best to achieve the desired outcome in a way that is the least restrictive of the person's rights or freedom**

2. Who is the Decision-maker in Health and Social Care Services?

The term '**decision-maker**' is a term for someone who has to provide care or treatment for someone who cannot consent because they lack the necessary capacity to do so. The decision-maker will vary depending on the individual circumstances and the type of decision involved.

Social care staff will be decision-makers for many day-to-day situations, as they will for longer-term decisions regarding the care of an individual who lacks capacity. Those making such decisions have some protection under **Section 5** of the MCA.

Section 5 talks about allowing carers, health and social care staff to carry out certain tasks without the fear of liability. These tasks involve the personal care, health care or treatment of people who lack capacity to consent to them and which must be carried out in the **best interests** of the person.

3. Best Interests Checklist (Code of Practice, 5. 1-5.69)

The MCA does not define best interests but identifies a number of factors that must be considered when determining the best interests of the individual who has been assessed as lacking capacity to make a particular decision or consent to acts of care or treatment.

The MCA makes it clear that, when determining what is in someone's best interests, you must not base the decision on the person's age or appearance or make unjustified assumptions based on their condition.

The following checklist must be taken into account when determining what is in someone's best interests:

- **Avoid making assumptions about what is in someone's best interests merely on the basis of the person's age, appearance, condition or behaviour.**
- **Consider a person's own wishes, feelings, beliefs and values and any written statements made by the person when they had capacity.**
- **Take account of the views of family and informal carers**
- **Can the decision be put off until the person regains capacity?**
- **Involve the person as fully as possible in the decision-making process**
- **Demonstrate that you have carefully assessed any conflicting evidence or views**
- **Provide clear, objective reasons as to why you are acting in the person's best interests**
- **Take account of the views of any independent mental capacity advocate**
- **Take the less restrictive alternative or intervention**

4. Recording Decisions about Capacity (Code of Practice 4.6 – 4.63)

4.1 Professional Staff

All professional staff involved in the care and treatment of a person who may lack capacity to make a particular decision at a particular time should clearly and accurately record the process of care and treatment and include the process of assessing capacity and best interests.

The record should be made where you regularly record details about the care and treatment of a service user such as a care plan and case notes. The recording should show:

1. **What the decision was**
2. **Why the decision was made, that is if the person has fluctuating capacity, could it be put off until such a time as the person may have the capacity to make the decision?**
3. **How the decision was made – who was involved and what information was used?**

Recording the process of decision-making in this way will assist staff to demonstrate why they had a reasonable belief the person lacked capacity and help inform colleagues or managers who may take over the assessor's work.

4.2 Care Assistants and Support Staff

For care assistants and support staff making day-to-day decisions on a regular basis, no formal assessment procedures or recording are required.

However, **Provider/ Service Plans** should show that capacity to make frequent decisions such as washing and dressing, being taken to the toilet etc has been assessed at some point, is reviewed from time to time and that any decisions made or actions taken are in the persons best interests and the least restrictive option.

If a decision is challenged, staff must be able to describe why they had a reasonable belief the person lacked the capacity to make a particular decision at a particular time. It is therefore advisable to make notes of new decisions, variances or fluctuations in capacity in a person's case file or notes.

(Please refer to your organisation's Recording Policy)

5. When is an Assessment of Capacity Required?

The core principles of the MCA state that you should always start from a point where you assume the person **has** capacity. Any doubts about a person's capacity to make a decision may occur because of:

- 1. The person's behaviour**
- 2. Their circumstances**
- 3. The concerns raised by someone else**

6. Assessing Capacity

The process of assessing capacity set out under the MCA is nothing new to the care management process we are all already familiar with and needs to be integrated into the usual assessment procedures, for us the Unified Assessment Process and Care Programme Approach.

What does change is the way in which previously informal ways of assessing a person's capacity is now enshrined in statute (written down in law), thereby requiring more formal mechanisms and procedures and crucially, the responsibility of the assessing professional.

6.1 How is Capacity Assessed? (Code of Practice, Chapter 4)

There are two questions to be asked if you are assessing a person's capacity to make a particular decision. These questions form the **Two Stage Test of Capacity** (Code of Practice, 4.11-4.13) and should be recorded clearly.

- 1. Is there an impairment of or disturbance in the functioning of the mind or brain?**
- 2. If so, is the impairment or disturbance sufficient that the person lacks the capacity to make that particular decision?**

Deciding that a person lacks the capacity to make a decision is a serious matter. A formal, clear and recorded process should be followed when an important decision is to be made.

Day-to-day assessments of capacity may be relatively informal but should still be recorded if a new decision about capacity in a particular decision is being

made. Staff need to be diligent in observing and recording patterns of behaviour and decision-making in order to help inform the assessment of capacity, should the need arise.

When assessing a person's capacity, you **must** consider the following factors:

1. **Is the person able to understand the information?**
2. **Is the person able to retain the information relevant to the decision that needs to be made?**
3. **Is the person able to use and process the information while considering the decision?**
4. **Can the person communicate the decision via whichever means of communication appropriate to them as an individual. This could be by blinking an eye or squeezing a hand when verbal communication is not possible**

If the person being assessed is unable to do any of the above, then they are unable to make the decision for themselves.

6.2 Who Assesses Capacity?

Anyone caring for or supporting a person who may lack capacity could be involved in assessing capacity. This will include family members and carers as well as health and social care staff.

Important and/or complex decisions may require multi-disciplinary and specialist opinions, for instance from Speech Therapists, Nurse Specialists, Psychologists, Psychiatrists and GP's. Who you involve depends on the individual circumstances.

6.3 Assessing Capacity in Practice

As a professional involved in assessing a person's capacity to make a decision, you **must always** bear in mind the five core principles and ensure that no one is treated as unable to make a decision unless all practical steps to help them have been exhausted and shown not to work.

Steps to be taken (Code of Practice, 3. 10-3. 16)

- Provide all relevant information but do not burden the person with more detail than required. Include information on the consequences of making, or not making, the decision. Provide similar information on alternative options that may be available.
- Consult with family and other people who know the person well, about how best to communicate with the person if appropriate. E.g. using pictures or signing etc. Check if there is someone who is good at communicating with the person involved.
- Be aware of any cultural, ethnic or religious factors, which may have a bearing on the individual. Consider whether an advocate or someone else could assist such as a member of a religious faith or community group to which the person belongs.
- Make the person feel at ease by selecting an environment that suits them, where interruptions and noise is at a minimum. Arrange to visit relevant locations; for example, if the decision is about a hospital or short break, visit the place with them. See if a relative or friend can be with them for support.
- Try to choose the best time for the person, ensuring the effects of any medication or treatment are considered. For example, if the person is taking medication that makes them drowsy, see them before they take it or after the effects have worn off.
- Finally, take it easy. Make one decision at a time, don't rush and be prepared to try more than once.

7. Sharing Information

7.1 Confidentiality (Code of Practice, Chapter 16)

People making decisions on behalf of people who lack capacity will often need to share personal information about the person lacking capacity. This information is required in order to ensure that decision-makers are acting in the best interest of the person lacking capacity.

When releasing information, the following must be considered:

- Is the person asking for the information acting as an agent on behalf of the person who lacks capacity?
- Is disclosure in the best interests of the person who lacks capacity?
- What kind of information is being requested?

Remember, access to personal information must be in accordance with the law. Disclosure of, and access to, information is regulated by:

- The Data Protection Act 1998
- The common law duty of confidentiality
- Professional codes of conduct
- Human rights Act 1998

It is worth noting that anyone who holds a Lasting Power of Attorney (LPA) will be entitled to any information as though they were the person who lacks capacity providing they are acting within the scope of their authority under the LPA.

8. Lasting Powers of Attorney (LPA) (Code of Practice, Chapter 7)

Under an LPA, a person can appoint another person to act on their behalf in relation to certain decisions regarding their property and finance and health and welfare matters.

LPAs replace the present Enduring Powers of Attorney. Forms and guidance on LPAs can be found at:

www.guardianship.gov.uk or www.publicguardian.gov.uk

In order to be valid, an LPA must be registered with the Public Guardian and on the prescribed form. An LPA is a formal, legal document.

8.1 What types of LPA are there?

There are two sorts of LPA to cover a range of circumstances. One is for **personal welfare (including healthcare)** decisions; the other is for **property and financial affairs**.

It is possible for one person to hold both types of attorneyship but a person with a LPA for property and financial affairs **will not** be able to act on behalf of the incapacitated person in relation to health and welfare decisions and vice versa.

A personal welfare LPA will only take effect once the person has lost capacity to make decision/s relating to this area and the LPA has been registered with the Office of the Public Guardian. If it has not been registered, it cannot be used.

A property and finance LPA will take effect immediately it has been registered unless the donor specifies that it should not take effect until they lose capacity to make such decisions for themselves.

8.2 Who can be an attorney?

An attorney can be a family member, friend or professional, such as a lawyer. The Code of Practice advised that Health and Social Care staff **should not** act as attorneys themselves in a professional capacity.

Attorneys must be over 18 years old and for property and finance LPAs, not bankrupt and can be part of a Trust or a bank as more than one individual may be appointed to act on behalf of the person who lacks capacity.

9. Court Appointed Deputies (MCA, Section 16 (4)(a))

Court Appointed Deputies are appointed by the Court of Protection to make ongoing decisions on behalf of a person who lacks the capacity to make those decisions.

A deputy can be appointed by the Court to deal with financial matters and/or personal welfare where no LPA exists or there is a serious dispute among carers that cannot be resolved in any other way. The appointment of a deputy is limited both in terms of what it can do and duration to reflect the principle of the least restrictive intervention.

A deputy can also be a relative or any other person the Court thinks is suitable. The deputy **must** act in accordance with Act's principles, in the person's best interests and with regard to the Code of Practice.

10. Resolving Disputes

The Court of Protection will only intervene in disputes when all efforts at mediation and arbitration have failed. All efforts to resolve the dispute should be made **before** considering an application to the Court.

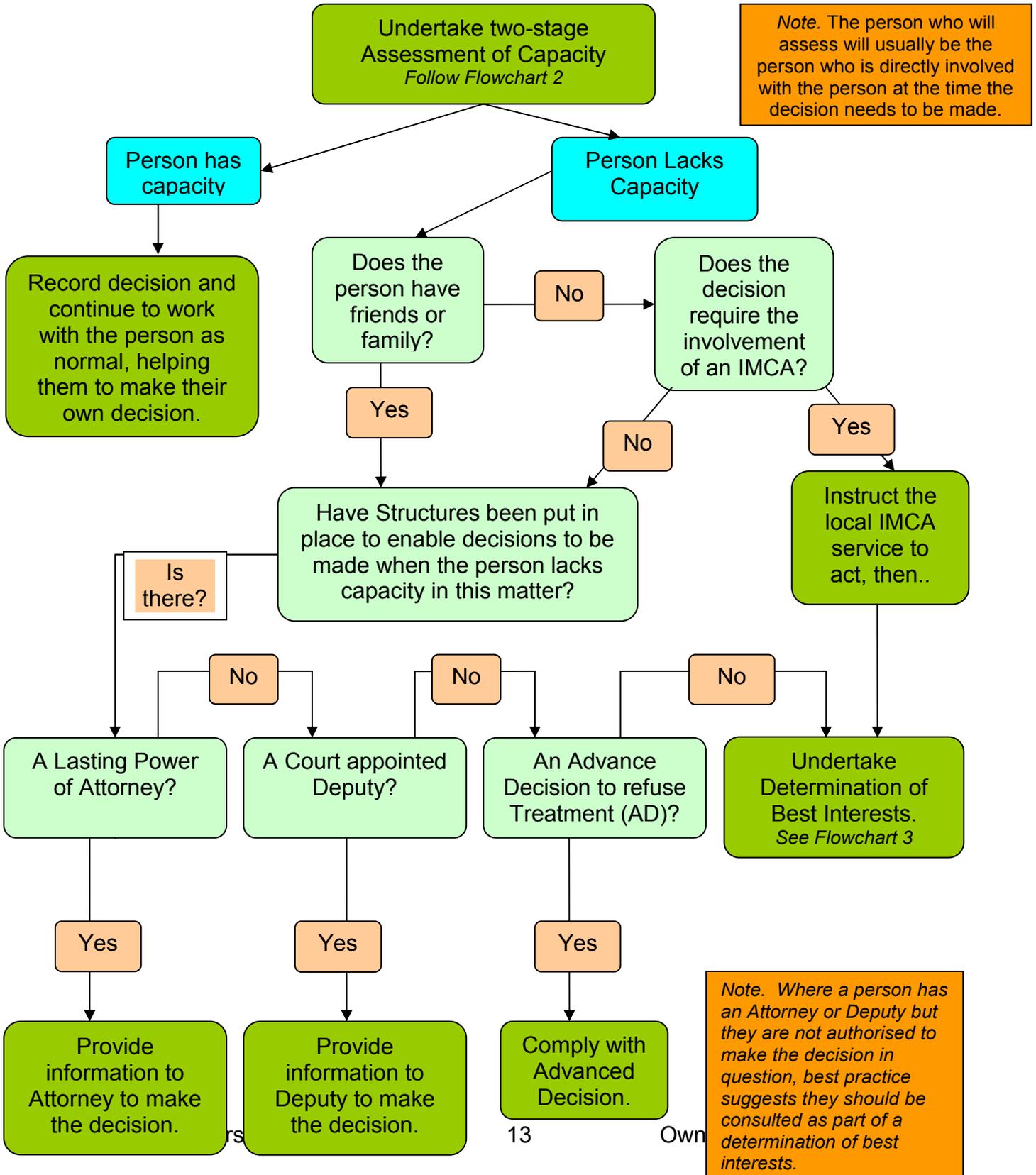
The Court will consider the applications and whether enough has been done to warrant their intervention. Alternative methods for resolving disputes include:

- Disputes between family members – may be dealt with informally or through mediation
- Disputes about health, social or welfare services – may be dealt with by informal or formal complaints procedure. **Please refer to your organisation's Representation & Complaints Procedure and Guidance.**
- Independent advocacy services may be able to help resolve a dispute

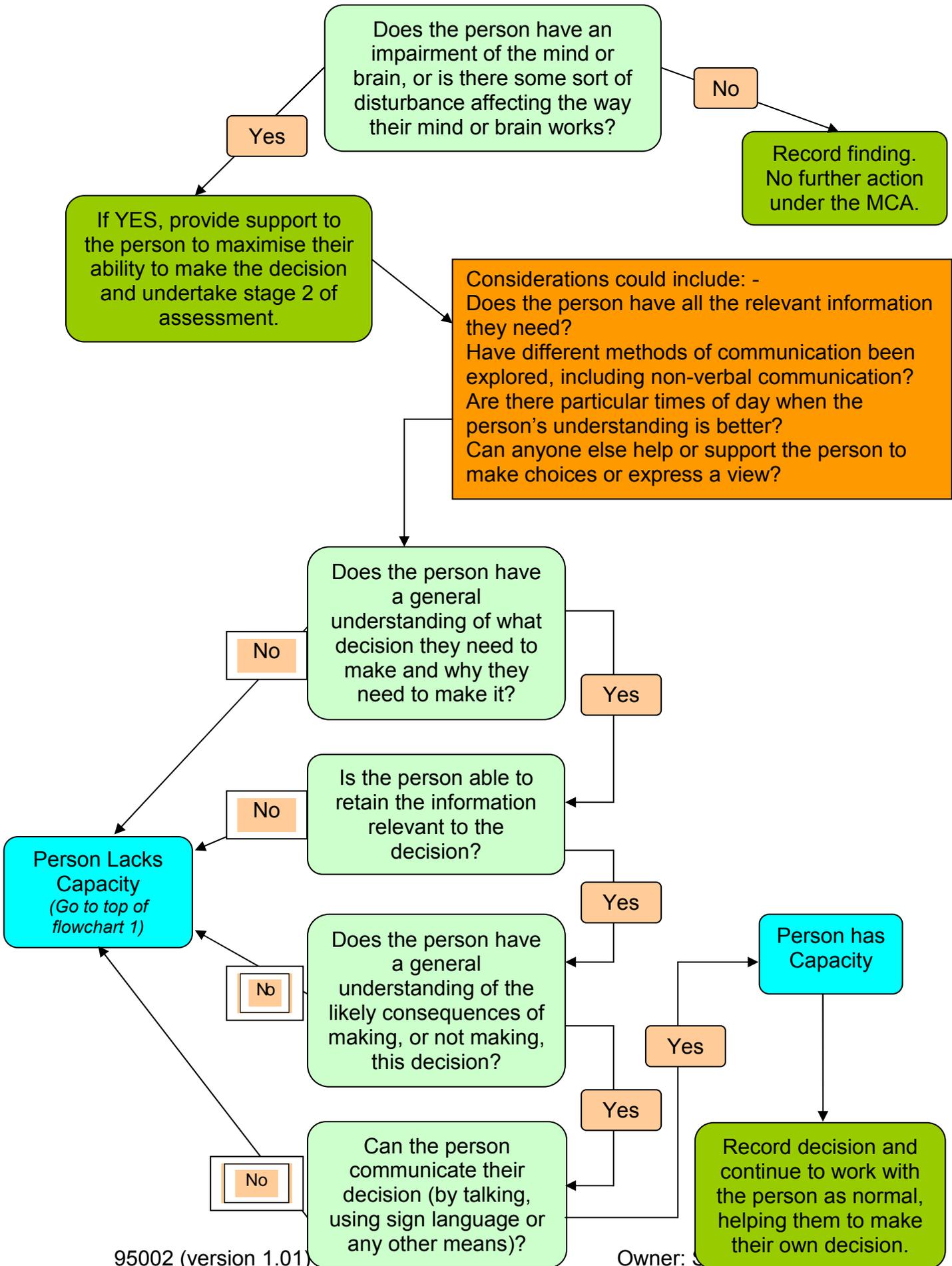
**Flowchart 1
Overall Process**

11. MCA Flowcharts

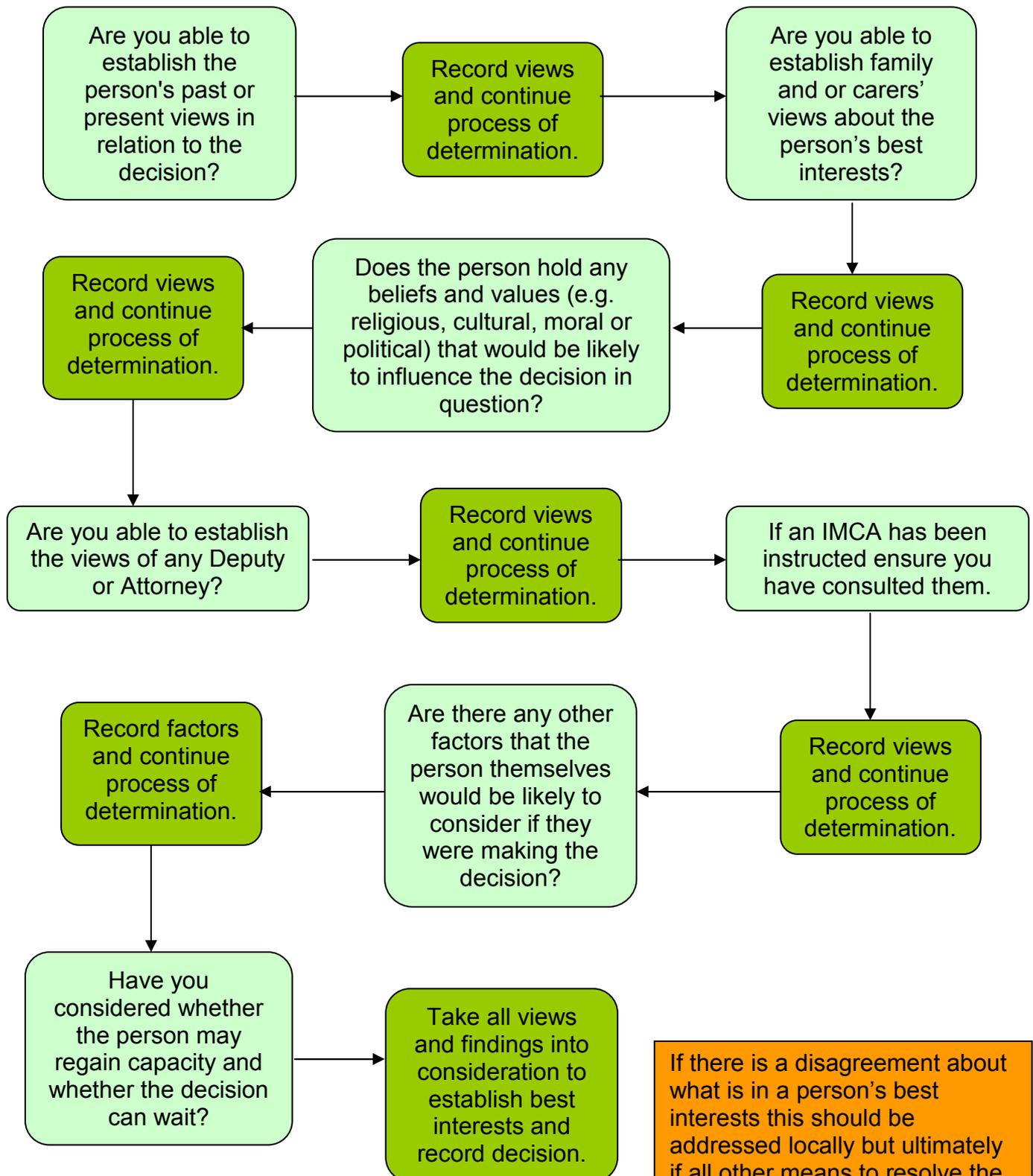
- If the person's behaviour or circumstances cause doubt as to whether they have capacity, or
- They have already been shown to lack capacity in other areas of their life, or
- Somebody else expressed concern about the person's capacity, then...



Flowchart 2 – Assessment of Capacity



Flowchart 3 – Determination of Best Interests. It is essential in determining best interests that you do whatever is possible to permit and encourage the person to take part in the decision making process. As such you should try to identify all the things that the person who lacks capacity would take into account if they were making the decision or acting for themselves. It is also essential that if the decision relates to life sustaining treatment that decision makers ensure that they are not motivated by a desire to bring about a person's death.



If there is a disagreement about what is in a person's best interests this should be addressed locally but ultimately if all other means to resolve the dispute have failed the Court of Protection might need to rule on the person's best interests.