EXECUTIVE COUNCIL

PUBLIC

Title:	Draft Mental Capacity and Deprivation of Liberty Policy
Paper Number:	191/24
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Responsible Director:	Director of Health and Social Services
Report Author:	Principal Social Worker – Adults
Portfolio Holder:	MLA John Birmingham
Reason for paper:	This paper is submitted to Executive Council: For policy decision (including budgetary policy)
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Previous papers:	Mental Capacity Policy - 77/23 DHS/AG Deprivation of Liberty, Use of Restraint and Restrictive Practice Policy – 61/24 DHS
List of Documents:	Draft Mental Capacity and Deprivation of Liberty Policy

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1. Recommendations

Honourable Members are recommended to:

(a) Note the attached draft Mental Capacity and Deprivation of Liberty Policy (the draft Policy);
(b) Approve that officers conduct a public consultation on the draft Policy; and
(c) Approve the inclusion of the mental capacity and deprivation of liberty legislation on the Legislation Programme for 2024/25.

2. Additional Budgetary Implications

There are no additional budgetary implications if the recommendations in this report are agreed. However, there will be a need to estimate the financial implications of implementing the Policy prior to final approval of the Policy and approval will be sought from EXCO should there be a need for additional budget.

3. Executive Summary

3.1 Executive Council has previously approved paper 77/23 which introduced the Mental Capacity Policy. This policy reflects the principles contained within the Mental Capacity Act 2005 (England and Wales) to support best practice in the Falkland Islands to protect people's rights to make their own decisions; and where this is not possible due to the individual lacking mental capacity, have decisions be made in their best interest.

3.2 Executive Council has further previously approved paper 61/24 which introduced the Falkland Islands Government Deprivation of Liberty, Use of Restraint and Restrictive Practice Policy. This Policy provides additional safeguards for those who, for their own safety and in their own best interest, need to be accommodated under care and treatment arrangements that may have the effect of depriving them of their liberty, but who lack the capacity to consent. It provides clear guidance to FIG employees who are required to deprive people of their liberty to deliver safe care and treatment in an acceptable manner using best practice.

3.3 The Mental Capacity Policy and the Falkland Islands Government Deprivation of Liberty, Use of Restraint and Restrictive Practice Policy are currently used internally by FIG practitioners and officials. However, the Falkland Islands does not currently have specific legislation regarding mental capacity and deprivation of liberty. The attached draft Policy will therefore form the basis of developing the Mental Capacity and Deprivation of Liberty Ordinance that will contain the necessary legal safeguards required to support people who lack mental capacity to make decisions. In addition, the proposed Ordinance will ensure that any deprivation of their liberty done to a person who lacks mental capacity will be done lawfully without the need to approach the Supreme Court (Court of Protection).

3.4 This paper therefore requests Honourable Members to note the attached draft Policy and further seeks approval for officers to conduct a formal public consultation on the draft Policy with interested and affected stakeholders.

4. Background [and Links to Islands Plan and Directorate Business Plan/s]

4.1 The age of the permanent population in the Falkland Islands is known to be increasing. The opening of Tussac House, a purpose-built facility providing long-term care for all residents including older people with care and support needs is imminent. In line with the opening of this new facility, significant work has been undertaken across the Department of Health and Social Services to introduce a policy and guidance to enable care and support staff to provide the highest level of care for adults.

4.2 The Mental Capacity Policy was introduced in 2023 (attached as Annex 1 to the draft Policy). This 2023 Policy reflects the principles contained within the Mental Capacity Act 2005 to support best practice in the Falkland Islands to protect people's rights to make their own decisions; and where this is not possible due to the individual lacking mental capacity, have decisions be made in their best interest.

4.3 The Deprivation of Liberty, Use of Restraint and Restrictive Practice Policy was introduced in 2024 (attached as Annex 2 to the draft Policy). This Policy provides additional safeguards for those who, for their own safety and in their own best interest, need to be accommodated under care and treatment arrangements that may have the effect

of depriving them of their liberty, but who lack the capacity to consent. It provides clear guidance to FIG employees who are required to deprive people of their liberty in order to deliver safe care and treatment in an acceptable manner using best practice.

4.4 The Mental Capacity Policy and the Deprivation of Liberty, Use of Restraint and Restrictive Practice Policy are currently used internally by FIG practitioners and officials.

4.5 However, the Falkland Islands does not currently have specific legislation regarding mental capacity and deprivation of liberty. The attached draft Policy will therefore form the basis of developing the Mental Capacity and Deprivation of Liberty legislation that will contain the necessary legal safeguards required to support people who lack mental capacity to make decisions. Such legislation will further ensure that should a person be deprived of their liberty due to lack of mental capacity this will be done lawfully, in terms of the processes outlined in the proposed legislation, without the need to approach the Supreme Court (Court of Protection).

4.6 The development of the Mental Capacity and Deprivation of Liberty Ordinance will therefore promote compliance with section 5 of the Falkland Islands Constitution ("the Constitution"), which provides that every person has a right to personal liberty and security of person. In terms of the Constitution, a person may be deprived of their liberty if it is authorised by law in the case of a person who is, or reasonably suspected to be of unsound mind for the purpose of their care or treatment or the protection of the community[1].

4.7 One of the commitments made in the Islands Plan 2022-2026 is to '*Continue to improve and deliver community support services for adults in need of care and support in our community, including opening the Tussac House facility'.* Some of the Actions that will be done for this commitment to be realised are *'Develop long term sustainable plan for individuals within the community (Life of the Individual)'* and '*Further enhance safeguarding (Children & Vulnerable Adults)'.* To achieve these Actions, some of the steps that need to be taken include *'Supporting policies and governance for model agreed will need to be developed'; 'Overarching theme of maintaining and supporting independence should be guiding principle'* The attached draft Policy is aligned to the commitments made in the Islands Plan, the proposed Actions and Tasks and will therefore assist to ensure that these commitments are fulfilled.

4.8 The Islands Plan 2022-2026 further has a commitment that seeks to '*Review our national equalities policies to grow an environment, across the whole community, where discrimination is challenged, people feel they are treated fairly and are protected from discriminatory practices and behaviours*.' The attached draft Policy is aligned to this aspiration as it will ensure that people who lack capacity are protected and are not subjected to any discriminatory practices due to their vulnerability.

5. Options – Policy Solutions

5.1 In summary, the draft Policy is proposing the following policy solutions:

5.1.1 **Development of Mental Capacity and Deprivation of Liberty Ordinance**

[1] see section 5(2)(i) of the Constitution.

The main policy intervention that will be introduced to assist people who lack capacity to make their own decisions will be the development of the Mental Capacity and Deprivation of Liberty Ordinance (the Mental Capacity Ordinance). The proposed Mental Capacity Ordinance will contain the necessary legal safeguards required to support people who lack capacity to make decisions. The proposed Ordinance will further ensure that any action that amounts to deprivation of liberty to a person lacking mental capacity is done lawfully in terms of this Ordinance without the need to approach the Supreme Court (Court of Protection). The proposed Mental Capacity Ordinance, whilst based on the Mental Capacity Act 2005, would be adapted to the unique health and social care context of the Falkland Islands. In brief, this proposed legislation will deal with the following:

(a) Provide clarification in law on who is regarded as lacking mental capacity;

(b) Indicate that decisions must be made in the best interest of the person who lacks mental capacity;

(c) re-establishment of the Court of Protection (CoP)- there is already an existing CoP that was established under the UK Mental Health Act of 1983. It is a specialised court that sits under the Supreme Court and the presiding officer is a Senior Magistrate who sits as the Acting Judge of the Supreme Court. The CoP will need to be re-established under the new Mental Capacity Ordinance to protect people who lack mental capacity through the performance of different functions that will be specified in law as detailed in the attached draft Policy;

(d) introduce the Deprivation of Liberty Safeguards which will apply to care homes, hospitals, sheltered housing and supported living to ensure compliance with section 5 of the Constitution;

(e) provide for the need to develop Codes of Practice- the Head of Courts, in consultation with the Safeguarding Adults Board and members of the public, will be given power to develop Codes of Practice for the guidance of persons involved with conducting different roles under the proposed Ordinance, e.g. guidance for Donees of lasting power of attorneys, guidance of Deputies appointed by the Court;

(f) introduce the granting of Lasting Power of Attorney (LPA)- the proposed Mental Capacity Ordinance will introduce the granting of a LPA by a Donor. LPAs will replace the existing Enduring Power of Attorney (EPA) for Property and Finance. There will be two types of LPAs which will be introduced and these are the LPA for Property and Finance; and the LPA for Health and Welfare;

(g) introduce the need to appoint a Deputy- If an individual loses the ability to manage their own affairs and does not have either a valid LPA or EPA then it may be necessary for the CoP to become involved in order to appoint a Deputy to make ongoing financial or welfare decisions for a person who lacks mental capacity;

(h) establish the Office of the Public Guardian (OPG)- an officer called the Public Guardian will be created under the new Mental Capacity Ordinance and this officer will be appointed by the Governor. In the Falkland Islands, currently some of the functions of the proposed Office of the Public Guardian are being done by the Registrar of the Supreme Court. It is recommended that this role continue to be undertaken by the Registrar of the Supreme Court. Some of the functions of the OPG include establishing and maintaining a register of LPA and EPA, establishing and maintaining a register of orders appointing Deputies and Receivers and supervising Deputies appointed by the CoP. It is envisaged that there will not be any conflict between the functions of the Registrar and the OPG because the Registrar does not exercise judicial powers or functions;

(i) introduce Advance Decision to Refuse Treatment- The proposed Mental Capacity Ordinance will also introduce the ability for people to make an Advance Decision to Refuse Treatment (ADRT). An ADRT is a legally binding decision that allows a person aged 18 and above, while still having capacity, to refuse specific medical treatment for a time in the future when they may lack capacity to consent to refuse the treatment;

(j) exclude certain decisions from being made on behalf of a person who lacks mental capacity- certain decisions relating to voting and family relationships will be excluded from being made on behalf of a person who lacks mental capacity, e.g. voting at an election for any public office, or at a referendum; consenting to marriage or a civil partnership; consenting to have sexual relations;

(k) appointment of Independent Mental Capacity Advocates- The Social Services Department will make arrangements to enable independent mental capacity advocates to be available to represent and support certain specified persons who lack mental capacity. It is proposed that the Justices of the Peace be appointed as independent mental capacity advocates as they form part of the Mental Health Tribunal. The Justices of the Peace have no judicial authority within the Court of Protection, they are long term residents and they have familiarity with formal proceedings. However, it will be important to ensure that they have no conflict of interest when they are chosen to represent a person in a matter;

(l) specify the legal parameters for conducting research on persons who lack mental capacity- any intrusive research carried out on a person who lacks capacity to consent to it will be considered to be unlawful unless it is carried out as part of a research project which is approved by the Director of Health and Social Services;

(m) outline the offences and penalties- the proposed Mental Capacity Ordinance will further outline the offences and penalties that apply in instances where people who are given powers under that Ordinance to care or take decisions on behalf of people who lack capacity are found to have mistreated and/or neglected the person who lacks capacity. On conviction the person found guilty will be sentenced to imprisonment for a term not exceeding 5 years or a fine or both;

(n) international protection of adults- the Falkland Islands is home to about 71 different nationalities. The Convention on the International Protection of Adults, 2000 (the Convention) provides for the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests. The Convention avoids conflicts between the legal systems of Contracting Parties in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of adults. Although the Falkland Islands is not a party to the Convention, it is proposed that the new Mental Capacity Ordinance uses the rules under this Convention to clarify when the Falkland Islands laws will apply and when the Falkland Islands will have jurisdiction over an adult who lacks mental capacity; and

(o) power to make rules and regulations- the proposed Mental Capacity Ordinance will give the Governor (Executive Council)[2], power to make Regulations that are necessary for the implementation of the Ordinance. The Chief Justice will be given power under the new Mental Capacity Ordinance to make CoP Rules such as rules on the applicable court fees.

5.1.2 **Deprivation of Liberty Safeguards**

(a) A Deprivation of Liberty occurs when a person is deprived of their liberty which can be summarised through what is called the "acid test":
A person is subject to continuous supervision and control; and
That person is not free to leave the place where they are.
A Deprivation of Liberty is only considered lawful is if it is done in terms of the law, it is necessary and proportionate, in the person's best interests and is the least restrictive option available to ensure the person's safety and well-being.

(b) Section 5(1) of the Constitution states that 'every person has the right to liberty and security of person'. Whilst caring and treating a person who lacks capacity to make decisions, there might be instances where restrictions will be placed upon such person in order to protect that person from harm. This may amount to deprivation of liberty. Therefore, any restrictions and/or restraints placed on a person who lacks capacity might result in deprivation of liberty and must be done lawfully as contemplated under section 5(2)(i) of the Constitution.

(c) The proposed Mental Capacity Ordinance will bring the Deprivation of Liberty Policy and Safeguards into law, thus preventing unlawful deprivation of liberty from occurring. Once the proposed legislation comes into force deprivation of liberty will be done in terms of the specified procedure in this Ordinance without the need to approach the Supreme Court (Court of Protection). Two types of Deprivation of Liberty Safeguards (DoLs) authorisations will be introduced in the proposed Ordinance; i.e. Urgent and Standard. An Urgent DoLS authorisation can last up to 7 days and is initially granted by the hospital

[2] It is important to note that this power will be exercised by the Governor subject to section 66(1) of the Constitution which requires, subject to section 66(2) and 67, the Governor to consult with the Executive Council when exercising functions conferred on the Governor by the Constitution or any other law; and the Governor shall accept the Executive Council's advice.

or care home where the person is being cared for. A standard DoLs can last for up to 12 months and will be granted by the Team Manager for Social Services.

5.1.3 **Harmonisation of the Mental Capacity and Deprivation of Liberty Ordinance with existing legislation**- There will be a need to ensure that the proposed Mental Capacity Ordinance does not conflict with the existing legal framework. In this regard, there will be a need to disallow certain UK laws from applying in the Falkland Islands such as the Enduring Powers of Attorney Act of 1985; the Court of Protection (Enduring Powers of Attorney) Rules of 2001; and the Enduring Powers of Attorney (Prescribed Forms) Regulations of 1990. In addition, there will be a need to ensure harmonisation between the proposed Mental Capacity Ordinance with other pieces of legislation such as the Mental Health Ordinance of 2010; the Assessment and Safeguarding of Adults Ordinance of 2020; the Administration of Estates Ordinance of 1949; the Crimes Ordinance of 2014; the Criminal Procedure and Evidence Ordinance of 2014; the Matrimonial and Civil Partnerships Proceedings Ordinance of 1979. There will also be a need to save the valid EPAs made under the Enduring Powers of Attorney Act 1985 and the Receivers that were appointed under the UK Mental Health Act 1983 or the Enduring Powers of Attorney Act 1985.

5.1.4 **Convention on International Protection of Adults**- please see discussion under paragraph 4.1 (m) above; and

5.1.5 **Designation of Mental Capacity Lead Officer**- It is further recommended that each FIG department must have a Mental Capacity lead officer who provides advice to relevant officials on how the proposed Mental Capacity Ordinance works. This could be merged with the current Designated Safeguarding Lead position currently held within each department and it will not be a statutory officer.

5.2 In light of the above, Honourable Members are requested to note the development of the attached draft Policy and approve that it be subjected to a formal consultation process.

5.3 On completion of the consultation process, the final version of the Policy will be submitted to ExCo for approval.

5.4 Some work has already commenced on development of Codes of Practice and the work around the development of the policies for Rules and Regulations will commence shortly this year in order to ensure that when the proposed Mental Capacity Ordinance comes into force it will be implementable. It is proposed that the new mental capacity legislation will commence in July 2025.

6. Options and Recommended Option

6.1 **Option 1-** That Honourable Members-

- note the attached draft Mental Capacity and Deprivation of Liberty Policy;
- approve that officers conduct a public consultation on the draft Policy
- approve the inclusion of the mental capacity and deprivation of liberty legislation on the Legislation Programme for 2024/25; and

Option 1 is recommended.

6.2 **Option 2:** Do nothing and do not approve that officers conduct a public consultation on the draft Policy.

Option 2 is not recommended. The Policy cannot reasonably be finalised without first conducting public consultation. There would remain no specific legislation in respect of mental capacity or deprivation of liberty in the Falkland Islands.

6.3 **Option 3:** Defer the decision and make recommendations for alternative provisions to be considered.

Option 3 is not recommended.

7. Consultation

7.1 The proposal to develop a Mental Capacity and Deprivation of Liberty Policy has been recommended by the Safeguarding Adults Board which includes the following representatives:

(a) Portfolio Holder for Health and Social Services;
(b) Portfolio Holder for Education;
(c) Director of Health and Social Services;
(d) Director of Education;
(e) Head of Social Services;
(f) Chief Medical Officer;
(g) Chief Nursing Officer;
(h) Attorney General through Crown Counsel – Civil & Safeguarding;
(i) Community Support Team Manager;
(j) Probation Officer;
(k) Royal Falkland Islands Police; and
(l) British Forces South Atlantic Social Worker.

7.2 Informal consultations have been held on the draft Policy and it has also been circulated for inputs to the different sections within the KEMH; the Attorney General's Office; the Head of Courts; the Senior Magistrate. In general, there was support to the proposed draft Policy and the inputs received were more on the need to clarify how the proposed interventions would work in practice. The draft Policy has therefore been updated to include the inputs received.

8. Resource Implications

8.1 Financial Implications

There will be a need to estimate the financial implications of implementing the Policy prior to final approval of the Policy.

8.2 Human Resource Implications

An officer called the Public Guardian will be created under the new Mental Capacity Ordinance and this officer will be appointed by the Governor. In the Falkland Islands, currently some of the functions of the proposed Office of the Public Guardian are being

done by the Registrar to the Supreme Court (see attached Table 1) that specifies the existing functions being done by the Registrar to the Supreme Court). It is anticipated that this role will continue to be undertaken by the Registrar of the Supreme Court.

8.3 Other Resource Implications

None

9. Legal and Legislative Implications

9.1 The attached draft Mental Capacity and Deprivation of Liberty Policy will support the development of legislation in the Falkland Islands. The legal implications have been included in the body of this report.

10. Equalities and Human Rights Implications

10.1 There is a Constitutional Right within the Falkland Islands to Personal Liberty and Freedom of Movement. Any interference with those rights must be lawful. The purpose of developing the proposed Deprivation of Liberty Policy is to ensure that any deprivation of liberty that occurs when a person is considered as lacking mental capacity is done lawfully without the need to approach the Supreme Court (Court of Protection).

10.2 The draft Policy and proposed Mental Capacity Ordinance will be compliant with section 16 of the Constitution. Section 16(2) of the Constitution provides that no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority, subject to subsections (6) and (7). The draft Policy does discriminate as it treats persons who lack mental capacity differently from those who do have mental capacity. However, section 16(6) of the Constitution provides that nothing contained in any law or done under the authority of any law shall be held to be inconsistent with section 16 to the extent that such law has an objective and reasonable justification and there is a reasonable proportion between the provision of law in question and the aim which the thing done under it seeks to realise. The aim of this draft Policy and the proposed law is to ensure that people who lack mental capacity are afforded certain legal protections. Although this draft Policy and the proposed Mental Capacity Ordinance will discriminate against such people, the proposed law will meet the requirements under section 16(6) of the Constitution because it has an objectively reasonable justification and is proportionate (e.g. through the inclusion of deprivation of liberty safeguards; promoting that decisions must be taken in their best interests; the re-establishment of the CoP to perform certain judicial functions aimed at protecting people who lack mental capacity).

11. Environmental & Sustainability Implications

11.1 None

12. Camp Implications

12.1 There are no differential implications for Camp arising from the development of the proposed Policy. The Policy would apply equally to residents of camp as to residents of Stanley.

13. Significant Risks

13.1 There are no significant risks associated with approving the development of a Mental Capacity and Deprivation of Liberty Policy. It will provide a foundation for the development of future legislation.

13.2 The proposed Policy will ensure that a Mental Capacity Ordinance is developed and this will eliminate the risk of any unlawful restrictions that may amount to a deprivation of liberty in instances where a person is considered as lacking mental capacity.

14. Publicity

14.1 This paper should be made publicly available.

15. Reasons for Recommending Preferred Option

15.1 A Mental Capacity and Deprivation of Liberty Policy will provide a clear statutory framework for best practice for all those working with adults who may lack capacity and require restrictions to be in place for their own safety and well-being. The proposed Policy and the development of a new legislation will assist with protecting the Constitutional Rights of those individuals and ensure that any restrictions that amount to a deprivation of liberty are lawful without the need to approach the Supreme Court (Court of Protection).

Social Services Department

Falkland Islands Government

Draft Mental Capacity and Deprivation of Liberty Policy

Document Name	Mental Capacity and Deprivation of Liberty Policy
Owner	Sam Lowe, Principal Social Worker – Adults, Social Services Department
Version Number	V2
Approval Date	
Approved By	
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Date of Last Review	3 December 2024
Date for Next Review	
Related Policy Documents	

Table of Contents

1. DEFINITIONS, ACRONYMS AND INTEPRETATION

1.1 For the purposes of this Policy, the following definitions and acronyms shall have the following meaning, unless the context requires otherwise: -

Attorney	means the person appointed by the Donor to make decisions on their behalf if they should lose capacity in the future. The Attorney must: • follow any instructions the Donor included in the Lasting Power of Attorney (LPA); • consider any preferences the Donor included in the LPA; • help the Donor make their own decisions as much as they can; • make any decisions in the Donor's best interest; and • respect the Donor's human and civil rights.
ADRT	means Advance Decision to Refuse Treatment.
Advance Decision to Refuse Treatment	means a legally binding decision that allows a person aged 18 or over, while still having capacity, to refuse specific medical treatment for a time in the future when they may lack capacity to consent to refuse the treatment.
CoP	means Court of Protection.

Court of Protection	means a specialised court which sits under the Supreme Court of the Falkland Islands and which was established under the Mental Health Act, 1983 and it makes decisions or appoints other people to make decisions on behalf of people who lack the capacity to do so for themselves. The CoP can decide whether a Lasting Power of Attorney (LPA) or Enduring Power of Attorney (EPA) is valid; remove Deputies or Attorneys or Receivers who fail to carry out their duties specified in legislation and makes decisions in cases concerning objections to register an LPA or EPA.
Deprivation of Liberty, Use of Restraint and Restrictive Policy	means the Falkland Islands Deprivation of Liberty, Use of Restraint and Restrictive Policy that was introduced in 2024 (Appendix Two.) The policy provides some additional safeguards for those who, for their own safety and in their own best interest, need to be accommodated under care and treatment arrangements that may have the effect of depriving them of their liberty, but who lack the capacity to consent. The policy provides additional guidance to FIG officials if they are required to apply restrictive measures or restraint

	measures as a proportionate response to the likelihood and seriousness of harm occurring, and if it is considered in the person's best interest.
Deprivation of Liberty Safeguards	means the procedure prescribed in law when it is necessary to deprive a person or patient who lacks mental capacity to consent to their deprivation of liberty for purposes of caring and treating them to keep them safe from harm.
DoLS	means Deprivation of Liberty Safeguards.
Deputy	means a person appointed by the CoP, in the absence of a valid LPA, to make decisions for a person once the person has lost capacity to make decisions for themselves.
Designated Mental Capacity Lead	means the official appointed to take the lead responsibility for mental capacity matters within Falkland Islands Government departments.
DMCL	means Designated Mental Capacity Lead.
Donee	means a person appointed by the Donor through an EPA or LPA to make decisions about all or any of the following— (a) the Donor's health and welfare or specified matters concerning the Donor's health and welfare, and (b) the Donor's property and financial affairs or specified matters concerning

	the Donor's property and financial affairs, and which includes authority to make such decisions in circumstances where the Donor no longer has capacity.
Donor	means a person over 18 years who has capacity to make decisions and who appoints other people (through a LPA or EPA) to make some decisions on the person's behalf in the future if such person loses the ability to do so themselves.
ECHR	means the European Convention on Human Rights.
Enduring Power of Attorney	means the power of attorney made under the Enduring Powers of Attorney Act, 1985. The Donor, through the EPA appoints a person(s) to make decisions on behalf of the Donor regarding the Donor's financial and property matters, if in the future, the Donor lose the ability to do so for themselves. An EPA does not permit decisions relating to health and welfare. The EPA should be registered with the court before it becomes valid. The EPA will be replaced by an LPA when the Mental Capacity and Deprivation of Liberty legislation has been introduced in the Falkland Islands.
EPA	means Enduring Power of Attorney.

Enduring Powers of Attorney Act, 1985	means the Enduring Powers of Attorney Act, 1985 which is a UK law that was extended to apply to the Falkland Islands. This Act introduced the Enduring Powers of Attorney which is a legal document whereby the Donor appoints an individual (attorney) to deal with the Donor's financial and property affairs. In the UK this Act was repealed by section 66(1)(b) of the Mental Capacity Act but continues to apply in the Falkland Islands.
FIG	means the Falkland Islands Government.
Mental Capacity	means the ability to use and understand information to make a decision, remember that information and communicate any decision made. A person lacks mental capacity if their mind is impaired or disturbed in some way, which means they are unable to make a decision at that time.
Mental Capacity Policy	means the Falkland Islands Mental Capacity Policy that aims to protect people's rights to make decisions, and their right to have decisions made in their best interest if they lack capacity to make a specific decision.
Lasting Power of Attorney	means a legal document that allows the Donor to appoint one or more people (Donee/s) to help the Donor to make decisions on behalf of the Donor when

	the Donor lacks capacity to make decisions.
LPA	means Lasting Power of Attorney.
MCA	means the UK Mental Capacity Act 2005.
Mental Capacity Act 2005	means the UK Mental Capacity Act 2005 which is a law that sets out how people will be supported to make decisions, or how decisions will be made on their behalf if a person's ability to make certain decisions is affected by an impairment of or disturbance in the functioning of the mind or brain.
Mental Capacity and Deprivation of Liberty Policy	means this Mental Capacity and Deprivation of Liberty Policy.
Office of the Public Guardian	means the statutory office that will be set up under the proposed Mental Capacity and Deprivation of Liberty Ordinance and will be responsible for overseeing the implementation of this Ordinance through helping people to stay in control of decisions about their health and finance and make important decisions for others who cannot decide for themselves.
OPG	means Office of the Public Guardian.
Receiver	means a person appointed by the CoP, in the absence of a valid EPA, through an Order for Receivership, to make decisions for a person once the person has lost capacity to make decisions for themselves.

Safeguarding Adults Board	means the statutory board established under section 12 of the Assessment and Safeguarding of Adults Ordinance 2020.

1.2 For the purposes of this Policy, a person will be considered as:

1.2.1 lacking capacity to make a decision in relation to a matter if at the material time the person is unable to make a decision for themselves in relation to the matter because of an impairment of, or a disturbance in the functioning of the mind or brain (It does not matter whether the impairment or disturbance is permanent or temporary); and

1.2.2 being unable to make a decision for themselves if they are unable to:-

(a) understand information relevant to the decision;

(b) retain the information relevant to the decision;

(c) use or weigh the information relevant to a decision as part of the process of making that decision, or

(d) communicate the decision. Communication can be done through talking, writing, using sign language or any other means.

2. PURPOSE

2.1 The purpose of this document is to provide the policy in relation to the protections that will be afforded to people who lack mental capacity to make their own decisions. The purpose of the Policy is therefore to develop and ensure implementation of a legal framework aimed at: -

2.1.1 protecting people's decision-making rights, and where people lack capacity to make their own decisions, to promote that decisions be made in their best interest; and

2.1.2 defining the measures and mechanisms that need to be taken in relation to care, treatment, welfare or deprivation of liberty in respect of persons who lack mental capacity in the Falkland Islands.

2.2 This Policy will therefore form the basis of developing Mental Capacity and Deprivation of Liberty legislation (Mental Capacity legislation) in the Falkland Islands that will

provide for the requisite safeguards and is based on human rights principles as drawn from the UK Mental Capacity Act 2005 and the Convention on the International Protection of Adults, 2000. The Policy will also introduce other interventions required to support people who lack mental capacity to make their own decisions.

3. INTRODUCTION AND BACKGROUND

Introduction

3.1 Globally, there is increasing attention on the rights of all adults to be supported to make their own decisions.[1] The most common reason cited for this increase is an ageing population, increased life expectancy and increased awareness of mental capacity issues.

3.2 In the Falkland Islands there are no statistics that have been kept regarding mental capacity however, there are known health and social care cases of people considered to be lacking mental capacity to make specific decisions.

3.3 A person who has been assessed as lacking mental capacity to make decisions is known to be at increased risk of abuse or harm. It is for this reason that the determination of whether a person has mental capacity has risen to greater importance.

3.4 In the modern world, mental capacity is now one of the important issues that governments are having to grapple with, specifically because of the prevalence of conditions associated with an ageing population, and other conditions that might be intimately linked to the loss of decision-making capability. This is because certain measures that might be taken when dealing with a person who lacks capacity has the potential to impede on that person's human rights.

3.5 Conditions that might cause impairment of, or a disturbance in the functioning of the mind or brain may include dementia, stroke, encephalitis, brain tumour, traumatic head injuries,

[1] *'Loss of Mental Capacity: A Global perspective'*; November 2023, by STEP, Sponsored by the UK Alzheimer's Society

delirium and mental illnesses such as schizophrenia and depression[2]. Therefore, developing mental capacity and deprivation of liberty legislation is important to ensure that any measures taken in relation to mental capacity and deprivation of liberty of persons are lawful.

Background

3.6 The age of the permanent population in the Falkland Islands is known to be increasing[3]. The opening of Tussac House, a purpose-built facility providing long-term care for all residents including older people with care and support needs is imminent. In line with the opening of this new facility, significant work has been undertaken across the Department of Health and Social Services to introduce a policy and guidance to enable care and support staff to provide the highest level of care for adults.

3.7 The Mental Capacity Policy was introduced in 2023 (attached as Annex 1). This 2023 policy reflects the principles contained within the Mental Capacity Act 2005 to support best practice in the Falkland Islands to protect people's rights to make their own decisions; and where this is not possible due to the individual lacking mental capacity to do so, have those decisions made in their best interest.

3.8 The Falkland Islands Deprivation of Liberty, Use of Restraint and Restrictive Practice Policy was introduced in 2024 (attached as Annex 2). This policy provides additional safeguards for those who, for their own safety and in their own best interest, need to be accommodated under care and treatment arrangements that may have the effect of depriving them of their liberty, but who lack the capacity to consent. It provides clear guidance to FIG employees who are required to deprive people of their liberty in order to deliver safe care and treatment in an acceptable manner using best practice principles.

3.9 The Mental Capacity in the Falkland Islands Policy and the Deprivation of Liberty, Use of Restraint and Restrictive Practice Policy are currently used internally by FIG practitioners and officials.

[2] Peng Soon and Others, '*Importance of mental capacity: time for greater attention and action'*, Singapore Medical Journal, 2015 Dec; 56(12): 646–648
[3] *'Falkland Islands Census Report 2021'* Falkland Islands Government Directorate of Policy, Economy & Corporate Services

3.10However, the Falkland Islands does not currently have specific legislation regarding mental capacity and deprivation of liberty. This Policy will therefore form the basis of developing Mental Capacity and Deprivation of Liberty legislation that will contain the necessary legal safeguards required to support people who lack mental capacity to make decisions.

3.11 The proposed Mental Capacity and Deprivation of Liberty legislation will be based on the UK Mental Capacity Act 2005 whose primary purpose is to promote and safeguard decision-making of people who lack mental capacity. This Act further allows deprivation of liberty in instances where this will be lawful and considered to be in the best interest of a person who lacks capacity to make decisions. However, there is a need to ensure that this Policy and its complementing legislation is focused on the Falkland Islands context for it to achieve its purpose and be effective.

Links of Policy to Islands Plan and other key Government priorities.

3.12One of the commitments made in the Islands Plan 2022-2026 is to '*Continue to improve and deliver community support services for adults in need of care and support in our community, including opening the Tussac House facility'*. Some of the Actions that will be done for this commitment to be realised include *'Develop long term sustainable plan for individuals within the community (Life of the Individual)'* and '*Further enhance safeguarding (Children & Vulnerable Adults)'.* To achieve these Actions, some of the steps that need to be taken include *'Supporting policies and governance for model agreed will need to be developed'; 'Overarching theme of maintaining and supporting independence should be guiding principle'; 'Safeguarding boards cemented into our legislation- Adult safeguarding board to be fully established alongside the existing Children's Safeguarding Board'.* The commitment made in the Islands Plan, the proposed Actions and Tasks are all aligned to this Policy and the Policy will assist to ensure that the commitment is fulfilled.

3.13The Islands Plan 2022-2026 further has a commitment that seeks to '*Review our national equalities policies to grow an environment, across the whole community, where discrimination is challenged, people feel they are treated fairly and are protected from discriminatory practices and behaviours*.' This Policy is aligned to this aspiration as it will

ensure that people who lack capacity are protected and are not subjected to any discriminatory practices due to their vulnerability.

4. SCOPE

4.1 The Policy is intended to promote and protect the decision-making rights of those who may temporarily or permanently lack mental capacity.

4.2 This Policy applies to everyone involved in the care, treatment and support of people aged 18 or over living in the Falkland Islands who are unable to make all or some decisions for themselves. This Policy includes provision to plan in advance for a time where a person may lack capacity to make decisions.

5. POLICY PRINCIPLES

There are five statutory principles which underpin the values and legal requirements of the MCA 2005. These principles underpin this Policy and will form the foundation upon which mental capacity legislation will be developed and implemented. The FIG will be informed by and will use the five principles to guide all its interactions, and to deliver care and support for people who lack mental capacity. These principles are:

5.1 A person must be assumed to have capacity unless it is established that they lack capacity;

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

5.3 A person is not to be treated as unable to make a decision merely because they make an unwise decision;

5.4 An act done, or decision made, under this Policy, for or on behalf of a person who lacks mental capacity, must be done, or made, in their best interest; and

5.5 Before an act is done, or a decision is made under this Policy for or on behalf of a person who lacks mental capacity, regard must be had as 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.

6. POLICY STATEMENT

6.1 This Policy will introduce mechanisms that will be utilised in the Falkland Islands to support decision making on behalf of people aged 18 and above who lack capacity to make their own decisions and regulatory measures that will be used when such people are deprived of their liberty for their own benefit and/or protection. These mechanisms and measures include the re-establishment of the CoP, the appointment of Deputies by the CoP, the introduction of the Deprivation of Liberty Safeguards, the establishment of the Office of the Public Guardian, the introduction of the granting of Lasting Power of Attorney and the introduction of issuance of Advance Decision to Refuse Treatment.

6.2 The Mental Capacity and Deprivation of Liberty legislation will be developed to support the implementation of this Policy's mechanisms and measures in the Falkland Islands. This proposed legislation will also consider existing policies such as the Mental Capacity in the Falkland Islands Policy and Deprivation of Liberty, and the Use of Restraint and Restrictive Practice Policy in order to provide mechanisms and measures stated in these policies with legal backing, thereby providing a clear statutory framework to protect the human rights and social inclusion of all persons who lack capacity to make their own decisions.

7. POLICY INTERVENTIONS

The main Policy intervention that will be developed to assist people who lack capacity to make their own decisions will be the Mental Capacity and Deprivation of Liberty legislation. The development of mental capacity and deprivation of liberty legislation, whilst based on the Mental Capacity Act 2005, would be adapted to the health and social care context of the Falkland Islands.

7.1 Mental Capacity and Deprivation of Liberty legislation

The proposed legislation will provide a statutory framework to empower and protect people who may lack capacity to make their own decisions about their health and welfare, and property and financial affairs, and will ensure that where they cannot make their own

decisions, protections are in place. This proposed legislation will, amongst other matters, provide for the following:

7.1.1 Clarify on who is regarded as lacking mental capacity

A person, aged 18 and above, will be regarded as lacking mental capacity to make a decision for themselves if they are unable to:-

(a) understand information relevant to the decision;

(b) retain the information relevant to the decision;

(c) use or weigh the information relevant to a decision as part of the process of making that decision; or

(d) communicate the decision. Communication can be done through talking, writing, using sign language or any other means.

A person may lack capacity for a short or longer period of time, whilst another person's mental capacity may fluctuate with time. It is important to note that if a person has a mental illness that falls under the Mental Health Ordinance 2010 (Mental Health Ordinance) it will not necessarily mean that such person also lacks mental capacity to make decisions.

7.1.2 Decisions to be made in the best interest of the person who lacks mental capacity

When making decisions on behalf of a person who lacks mental capacity to make the decision there is a need to consider what is in the best interest of that person before the decision is made. When making a 'best interest decision' on behalf of a person who lacks mental capacity the following issues will need to be considered:

(a) their past and present views, beliefs, values and wishes, such as their moral, political and religious views;

(b) what is written on the advance statement (if any);

(c) what is written on the advance decisions (if any);

(d) whether the person will be able to make the decision for themselves;

(e) if they can make their own decision, when the person is likely to make the decision; and

(f) any other relevant important factors that are specific to the matter at hand.

Whilst making a decision, the decision maker must allow and encourage the person to be involved with the decision that affects them.

7.1.3 Court of Protection (CoP)

(a) In the Falkland Islands there is already an existing CoP that was established under the UK Mental Health Act 1983. It is a specialised court that sits under the Supreme Court and the presiding officer is the Chief Justice who may allocate the business of the court to an Acting Judge of the Supreme Court. It is therefore proposed that this current arrangement continues specifically because in terms of Schedule 2 of the Law Revision and Publication Ordinance, 2017 the Supreme Court of the Falkland Islands has equivalent powers and jurisdiction to the High Court of England and Wales. This is because in terms of section 47(1) of the MCA, the CoP for UK sits at the same level and has the same jurisdiction, powers, rights, privileges and authority as the High Court of England and Wales. However, it will be important for the existing CoP in the Falkland Islands to have functions as outlined under the MCA 2005.

(b) In light of the above, the CoP will need to be re-established under the proposed Mental Capacity legislation to protect people who lack mental capacity through the following:

- deciding whether a person has the mental capacity to make a particular decision that will affect that person;
- appointing Deputies to make ongoing decisions for people who lack mental capacity;
- removing Deputies or Attorneys who have not carried out their role properly and requesting reports regarding their behaviour. A Deputy/ Attorney can be removed due to fraud, acting dishonestly, failing to act in the best interest of the Donor, if they act outside of their authority or if they are not able to act as Attorney/ Deputy through illness or other reasons;
- giving certain people permission to make decisions on behalf of someone else who lacks mental capacity;
- handling urgent or emergency applications where a decision must be made on behalf of someone else without delay;

- making decisions about registration of an Enduring Power of Attorney (EPA);
- considering the validity and/or any objections to the registration of EPAs and LPAs;
- considering applications to make statutory wills or gifts;
- deciding whether an advance decision is valid; and
- making decisions about when a person can be deprived of their liberty under the legislation.

(c) The CoP will have power:

- under section 204 of the Law of Property Act 1925 (c. 20) (orders of Supreme Court conclusive in favour of purchasers) as it applies in relation to orders and directions of the court as it applies to orders of the Supreme Court.
- to make interim orders and directions pending the determination of an application to it in relation to a person who might lack mental capacity in respect of any matter if—
    - the matter is one where the court has power to deal with under the Ordinance, and
    - it is in the person's best interest to make the order, or give the directions, without delay.
- to call for reports in proceedings brought in respect of a person who might lack mental capacity where the court is considering a question relating to that person;
- to require a report relating to the person who might lack mental capacity to be made to it by the Public Guardian or the Department of Health and Social Services as the court may direct. The Public Guardian will have discretionary power to decide whether to order a report or request that a person be interviewed in private during the course of complying with a requirement from the CoP.

(d) The CoP will sit as and when there are matters that require to be determined by this court under the proposed Mental Capacity legislation.

(e) An appeal from the CoP will go to the Court of Appeal.

(f) Applications to the Court of Protection

- Permission will not be required for an application to the CoP for the exercise of any of its powers under the proposed legislation by the following people:-
    - a person who lacks, or is alleged to lack, capacity;
    - the Donor or a Donee of a Lasting Power of Attorney to which the application relates;
    - the Donor or an Attorney of an Enduring Power of Attorney to which the application relates;
    - a Deputy appointed by the court for a person to whom the application relates;
    - a person named in an existing order of the CoP, if the application relates to the order; or
    - any independent mental capacity advocate or appropriate person representing and supporting the person who might lack mental capacity.
- Permission will be required for any other application to the COP subject to this court's Rules. When deciding whether to grant such permission the court must have regard to—
    - the applicant's connection with the person to whom the application relates;
    - the reasons for the application;
    - the benefit to the person to whom the application relates of a proposed order or directions; and
    - whether the benefit can be achieved in any other way.

(f) Court of Protection Rules

- Currently there are the CoP Rules, 2001 which were adopted from the UK and apply in the Falkland Islands. These Rules were made under the UK Mental Health Act 1983 and therefore do not consider the matters under the MCA. In this regard, there is a need to develop new Rules for the CoP.
- It is proposed that the powers to make CoP Rules be given to the Chief

Justice of the Falkland Islands. The Chief Justice will need to consult with the Safeguarding Adults Board and the public prior to finalising the CoP Rules. The Court of Protection Rules may make provision for the following:—

- the manner and form in which proceedings are to be commenced and served;
- specify the persons who will be notified and made parties to court proceedings;
- to enable the court to appoint a suitable person to act on behalf of or represent the person who lacks mental capacity;
- to enable the court to dispose of an application without a hearing;
- to enable the court to proceed with, or with any part of, a hearing in the absence of the person to whom the proceedings relate;
- to enable or require the proceedings or any part of them to be conducted in private;
- as to what may be received as admissible evidence and the manner in which it must be presented;
- for the enforcement of orders made and directions given in proceedings;
- specify the cases which require permission before an appeal from a decision of the court is made;
- the person entitled to grant permission to appeal;
- any requirements that need to be satisfied before permission is granted; and
- specify matters which, unless the court directs otherwise, must also be dealt with in the reports that will be submitted to the court.

7.1.4 Codes of practice

- The Head of Courts in consultation with the Safeguarding Adults Board and members of the public will need to be given power to prepare and issue the following codes of practice for the guidance of—

  (a) persons assessing whether a person has capacity in relation to any

matter;

(b) persons acting in connection with the care or treatment of another person;

(c) Donees of lasting powers of attorney;

(d) Deputies appointed by the court;

(e) carrying out research under the proposed Ordinance;

(f) independent mental capacity advocates;

(g) persons exercising functions with respect to advance decisions.

- The Head of Courts may revise a code of practice from time to time as necessary.
- The following people who act on behalf of a person who lacks capacity will need to comply with the relevant code—
  (a) the Donee of a lasting power of attorney;
  (b) a Deputy appointed by the court;
  (c) a person carrying out research under the proposed Ordinance;
  (d) an independent mental capacity advocate;
  (e) an official acting in a professional capacity.

7.1.5 Lasting Power of Attorney (LPA)

(a) The proposed Mental Capacity legislation will introduce the granting of a LPA by a Donor. LPAs will replace the existing EPA for Property and Finance. There will be two types of LPAs which will be introduced and these are the LPA for Property and Finance; and the LPA for Health and Welfare.

(b) A Donor can decide to make one or both types of LPAs. It is important to note that the powers for the attorney can be restricted by clearly stating this in the LPA.

(c) LPA for Property and Finance is broadly similar to EPA. It allows someone aged 18 or over (a Donor), while still having capacity, to give authority to an Donee(s) to make decisions regarding the Donor's property and financial affairs. This might include decisions relating to managing a bank or building society account; making or selling investments; paying bills; collecting benefits or a pension; or

buying or selling a house or other property. A Donor may agree for this LPA to be used as soon as it is registered, even if the Donor still has mental capacity or the Donor can choose that the Donee will only start making decisions when the Donor loses mental capacity.

(d) **LPA for Health and Welfare** provides authority to a Donee(s) to make decisions about the Donor's health and welfare. This might include decisions relating to matters such as the daily routine, for example washing, dressing, eating; medical care/ treatment; moving into a residential care or where the Donor should live; complaints about care and treatment of Donor; or life-sustaining treatment. Under the LPA for Health and Welfare, the Donee will only be able to make decisions for the Donor if the Donor loses mental capacity to make decisions.

(e) LPAs are more flexible than EPAs. An LPA does not need to be registered with the court, instead an LPA must be registered with the Office of the Public Guardian after it has been signed. The Donee will not be able to act under an LPA until it is properly registered with the Public Guardian. There will be a need to develop LPA forms and issue a code of practice for the guidance of Donees of LPA.

(f) A Donee appointed under an LPA does not have to be a lawyer or someone with specialist knowledge. Therefore, a Donor's partner, a family member, a friend or a professional may be appointed as a Donee. A person who can be appointed as a Donee under an LPA must be at least 18 years old; have mental capacity to make decisions; and not be any person who is an undischarged bankrupt.

(g) A Donor who still has mental capacity may choose to cancel/ revoke an LPA by sending to the Office of the Public Guardian the original LPA, along with a written statement from the Donor to cancel/ revoke the LPA. The Donor must also inform other relevant organisations that the Donee may have already dealt with such as the Donor's bank. An LPA will automatically end if the Donor dies or the appointed Donee loses mental capacity or dies.

7.1.6 Appointment of a Deputy

(a) If an individual loses the ability to manage their own affairs and does not have either a valid LPA or EPA then it may be necessary for the CoP to become involved in order to appoint a Deputy to make ongoing financial or welfare decisions for a person who lacks mental capacity. If the CoP agrees to appoint a Deputy it will issue a court order which will state the powers that the Deputy will have. There will be two types of Deputy Orders that will be introduced and that may be issued by the CoP which are the Property and Financial Affairs Deputy and the Health and Welfare Deputy.

(b) A Deputy must be a person who is at least 18 years of age and be capable of making decisions on behalf of a person who lacks capacity. However, the CoP will decide if the person applying to be a Deputy is suitable and will specify the powers that the person will have. A Deputy can be a close relative, friend, a solicitor or a government official. There will be a need for Deputies to follow the code of practice for the guidance of Deputies appointed by the court that will be developed under the proposed Mental Capacity legislation.

(c) If a person wants to apply to become a Deputy they will need to complete the relevant prescribed forms and submit to the CoP. The CoP will then review the application and make a decision. A code of practice for the guidance of Deputies appointed by the CoP will need to be prepared to assist people who wish to apply as Deputies under the proposed legislation.

(d) If a person regains their capacity to make decisions then the Deputy must inform the CoP. The CoP might decide to end the Deputy Order. A Deputy Order will end automatically if the person who lacks mental capacity dies.

7.1.7 Advance Decision to Refuse Treatment

(a) The proposed Mental Capacity legislation will also introduce the ability for people to make an Advance Decision to Refuse Treatment (ADRT). An ADRT is a legally binding decision that allows a person aged 18 and above, while still having

capacity, to refuse specific medical treatment for a time in the future when they may lack capacity to consent to refuse the treatment. An ADRT must be valid (the person must not have withdrawn it); and it must clearly refer to the relevant type of treatment and explain the circumstances where the person would want to refuse the treatment.

(b) It is the responsibility of the person making the ADRT to make sure their decision will be drawn to the attention of healthcare professionals when it is needed. Some people may want their decision to be recorded on their healthcare records. Those who do not will need to find other ways of alerting people that they have made an ADRT and where to find any written document and supporting evidence. It is also useful to share this information with family and friends, who may alert healthcare professionals to the existence of an ADRT, but it is not compulsory.

(c) If the conditions for a valid ADRT mentioned under paragraph 7.1.7(a) above are met, healthcare professionals must follow the ADRT. If the ADRT refuses life-sustaining treatment, it must be in writing, signed and witnessed; and must state clearly that the decision applies even if life is at risk.

(d) An ADRT may be withdrawn or altered at any time when the person who issued it still has mental capacity to do so. A withdrawal (including a partial withdrawal) need not be in writing. Furthermore, an alteration of an advance decision need not be in writing unless it relates to a life sustaining treatment.

(e) The instances within which an ADRT will not be considered to be valid will include if the person who issued it:

- withdrew the decision at a time when he still had capacity to do so;
- has, under an LPA for Health and Welfare which was created after the advance decision was made, conferred authority on the Donee(s) to give or refuse consent to the treatment to which the advance decision relates; or
- has done something that is clearly inconsistent with the advance decision.

(f) It is imperative to note that an advance decision will not apply to the treatment in question if:

- at the material time the person who issued it has capacity to give or refuse consent to the treatment;
- that treatment is not the treatment specified in the advance decision;

- any circumstances specified in the advance decision are absent; or
- there are reasonable grounds for believing that circumstances exist which the person who issued the advance decision did not anticipate at the time of the advance decision and which would have affected their decision had they anticipated them.

(g) An advance decision will not apply to a life-sustaining treatment unless:-

- the decision is verified by a statement made by the person issuing it to the effect that it is to apply to that treatment even if life is at risk; and
- the decision and statement comply with the requirements stated under paragraph 7.1.7 (g) below.

(h) The requirements for a decision or statement are as follows—

- it must be in writing;
- it must be signed by the person who issued it or by another person in presence and by direction of the person on whose behalf it is being issued;
- the signature must be made or acknowledged by the person issuing the decision in the presence of a witness; and
- the witness must sign it, or acknowledge their signature, in the presence of the person issuing the decision or statement.

(i) The CoP will have power under the proposed Mental Capacity legislation to make a declaration on whether an advance decision exists, is valid or is applicable to a treatment. However, whilst the decision is still being sought from the CoP, nothing in an apparent advance decision stops a person from:-

- providing life-sustaining treatment; or
- doing any act, they believe is necessary to prevent a serious deterioration of the condition of the person who issued the advance decision.

(j) People who make an ADRT should consider informing their family, friends and carers so they know about their ADRT.

7.1.8 Excluded Decisions

Certain decisions relating to voting and family relationships will be excluded from being made on behalf of a person and these are voting at an election for any public office, or at a referendum; consenting to marriage or a civil partnership; consenting to have sexual relations; consenting to a decree of divorce being granted; consenting to a dissolution order being made in relation to a civil partnership; consenting to a child being placed for adoption by an adoption agency; consenting to the making of an adoption order; discharging parental responsibilities in matters not relating to a child's property; or giving a consent for human fertilisation.

7.1.9 Office of the Public Guardian (OPG)

An officer called the Public Guardian will be created under the proposed Mental Capacity legislation and this officer will be appointed by the Governor. Currently some of the functions of the proposed Office of the Public Guardian are being carried out by the Registrar to the Supreme Court (see attached Table 1). It is anticipated that this role will continue to be undertaken by the Registrar of the Supreme Court. It is envisaged that there will not be any conflict between the functions of the Registrar with those of the Public Guardian as the Registrar does not exercise judicial powers or functions. The Public Guardian's responsibilities will include the following:

(a) submission of annual report on their activities to the Safeguarding Adults Board;
(b) establishing and maintaining a register of Lasting Power of Attorney and Enduring Power of Attorney;
(c) establishing and maintaining a register of orders appointing Deputies and Receivers;
(d) supervising Deputies appointed by the CoP;
(e) directing an expert to visit a person who lacks mental capacity and report back to the Public Guardian on such matters as they may direct;
(f) receiving security which the CoP requires a person to give for the discharge of their functions;
(g) receiving reports from Donees of Lasting Power of Attorney and Deputies appointed by the CoP;

(h) reporting to the CoP on such matters relating to proceedings under the proposed Mental Capacity legislation as the CoP requires;

(i) dealing with representations (including complaints) about the way in which a Donee of a LPA or an EPA or a Deputy or Receiver appointed by the CoP is exercising their powers and directing the submission of any reports on these matters; and

(j) publishing, in any manner the Public Guardian thinks appropriate, any information they think appropriate about the discharge of their functions.

The functions conferred to the Public Guardian under paragraphs 7.1.9 (e) and (h) above may be discharged in cooperation with any other person who has functions in relation to the care or treatment of the Donor.

7.1.10 Appointment of Independent Mental Capacity Advocates

The Social Services Department will make arrangements to enable independent mental capacity advocates to be available to represent and support certain specified persons who lack mental capacity. It is proposed that the Justices of the Peace be appointed as independent mental capacity advocates as they form part of the Mental Health Tribunal. The Justices of the Peace have no judicial authority within the Court of Protection, they are long term residents and they have familiarity with formal proceedings. However, they will require training as independent mental capacity advocates and it will be important to ensure that they have no conflict of interest when they are chosen to represent a person in a matter.

7.1.11 Research

(a) Any intrusive research carried out on a person who lacks capacity to consent to it will be considered to be unlawful unless it is carried out as part of a research project which is approved by the Director of Health and Social Services. When considering applications for research projects the Director must be satisfied that the research is connected with—

- an impairing condition affecting the person who lacks capacity, or
- its treatment.

(b) The research to be conducted must-

- have the potential to benefit the person who lacks capacity without imposing on such a burden that is disproportionate to the potential benefit that the person will derive from the research; or
- be intended to provide knowledge of the causes or treatment of a person affected by the same or a similar condition.

(c) There must be a requirement placed on the researcher to consult and get advice from the carer of the person who lacks mental capacity to check whether such person lacking mental capacity should take part in the project.

7.1.12 Offences and Penalties

The proposed Mental Capacity legislation will further outline the offences and penalties that apply in instances where people who are given powers under that legislation to care or take decisions on behalf of people who lack capacity are found to have mistreated and/or neglected the person who lacks capacity. On conviction the person found guilty will be sentenced to imprisonment for a term not exceeding 5 years or a fine or both.

7.1.13 International Protection of Adults

(a) The Falkland Islands is home to about 71 different nationalities[4]. As explained under paragraph 7.4 below, the Convention on the International Protection of Adults, 2000 (the Convention) provides for the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their own interests. This is because people are now living in a global village within which a person might be residing in one or more countries but having assets in other countries.

(b) The Convention avoids conflicts between the legal systems of Contracting Parties in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of adults. Although the Falkland Islands is not a party to the Convention, it is proposed that the new Mental Capacity legislation

[4] Falkland Islands Census Report 2021, Falkland Islands Government, Directorate of Policy, Economy and Corporate Services, page 9

uses the rules under this Convention to clarify when the Falkland Islands laws will apply and when the Falkland Islands will have jurisdiction over an adult who lacks mental capacity.

7.1.14 Power to make Rules and Regulations

(a) The proposed Mental Capacity legislation will give the Governor power to make Regulations.

(b) The Governor (Executive Council)[5] will have power to make Regulations on the following matters:

- maximum authorisation period for detaining a person who lacks mental capacity;
- requiring the monitoring and reporting of deprivation of liberty cases by the hospital or care home;
- managing authority, supervisory body, hospital or care setting to disclose certain information relating to deprivation of liberty;
- the form of Lasting Powers of Attorney;
- requirements in connection with the execution of Lasting Powers of Attorneys;
- certification of Lasting Powers of Attorneys;
- the form for applying to be a Deputy;
- notification requirements applicable when a Donor or Donee is about to make an application to register a Lasting Power of Attorney with the Public Guardian;
- the period within which a Donor or Donee may object to the registration of a Lasting Power of Attorney by the Donor or Donee, respectively;
- the grounds on which a person may object to the registration of a Lasting Power of Attorney;
- the form confirming registration of a Lasting Power of Attorney;

[5] Section 66(1) of the Constitution requires, subject to section 66(2) and 67, the Governor to consult with the Executive Council when exercising functions conferred on the Governor by the Constitution or any other law; and the Governor shall accept its advice.

- the form for the registration of Attorneys;
- the statements that must be contained when registering an Attorney;
- the appointment and functions of independent mental capacity advocates.

(c) The Chief Justice will need to be given power under the new Mental Capacity legislation to make CoP Rules. Rules will need to be made on the applicable court fees and costs; instances where people will be exempted from paying court fees and costs and instances where remission of court fees and costs will apply. Court Rules for the CoP will also need to be made. Consultation with the Safeguarding Adults Board will be required before the Rules are published for implementation.

(d) Additional matters that require Rules and Regulations will be identified once the new Mental Capacity legislation has been drafted.

7.2 Deprivation of Liberty Safeguards

(a) Section 5(1) of the Constitution states that 'every person has the right to liberty and security of person'. Whilst caring for and treating a person who lacks capacity to make decisions, there might be instances where restrictions will be placed upon such person in order to protect them from harm. This may amount to deprivation of liberty. Such circumstances include the following:

- the person is subject to a high level of supervision, and is not free to leave the premises;
- frequent use of sedation/medication to control behaviour of a person;
- regular use of physical restraint to control the behaviour of a person;
- the person concerned objects verbally or physically to the restriction and/or restraint;
- objections from family and/or friends to the person's restriction or restraint;
- the person is confined to a particular part of the establishment in which they are being cared for; or

- possible challenge to the restriction and restraint being proposed to the Court of Protection or a letter of complaint in relation to the person's restriction or restraint.

(b) In light of the above, any restrictions and/or restraints placed on a person who lacks capacity might result in deprivation of liberty and must be done lawfully. Section 5(2)(i) of the Constitution further states that '*no person shall be deprived of his or her personal liberty save as may be authorised by law in any of the following cases… in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his or her care or treatment or protection of the community*'. Therefore, provisions will be included in the proposed Mental Capacity legislation that will provide for instances which will allow for deprivation of liberty to a person who lacks mental capacity.

(c) The Falklands Islands Government's Deprivation of Liberty, Use of Restraint and Restrictive Practice Policy currently provides professionals with information to consider when the use of deprivation of liberty, restraint or restrictive practice is occurring or contemplated and specifies the additional safeguards which are required to ensure individuals rights are protected. However, this policy is currently not supported by law as is required under section 5(2) of the Constitution.

(d) Deprivation of liberty is a very serious matter and should not happen unless necessary, and in the best interest of the person concerned. In this regard, the proposed legislation would bring the Deprivation of Liberty Policy and Safeguards into law, thus preventing unlawful deprivation of liberty from occurring.

(e) Deprivation of Liberty Safeguards ensure that adults over the age of eighteen who cannot consent to their care arrangements in a care home, hospital, sheltered housing or supported living are protected. There have been two deprivation of liberty applications made to the Supreme Court sitting as the CoP within the past twelve months. It is anticipated that with the opening of Tussac House and the increasing age of the population, there might be a greater number of applications in the future.

(f) The proposed mental capacity legislation will ensure that the decision to deprive someone of their liberty, where the person lacks capacity to consent is only made following a defined process and in consultation with specific authorities. Additional Deprivation of Liberty Safeguards (DoLS) will therefore be introduced into law to ensure that the decision to deprive someone of their liberty is only made following a defined authorisation process and for an agreed period that does not exceed the maximum prescribed period.

(g) Two types of DoLs authorisations will be introduced; i.e. Urgent and Standard. An Urgent DoLS authorisation can last up to 7 days and are initially granted by the hospital or care home where the person is being cared for. If needed, urgent authorisations can be extended for a further 7 days. This type of authorisation can be used if a person urgently needs to be deprived of their liberty before they have had a full assessment. When using an urgent authorisation, a request for a standard authorisation should also be made. An urgent authorisation should only be made when there is a reasonable belief that a standard authorisation would be granted.

(h) In all other circumstances, a standard DoLs authorisation should be requested. Social Services in collaboration with the Emotional Wellbeing Service then has 21 days to carry out assessments to ensure that the deprivation of liberty is appropriate. Standard authorisations should be reviewed regularly and can last up to 12 months.

(i) For both the standard and urgent authorisations the assessors will consider whether the following conditions are met for each application:—

- the age requirement- whether the person has reached 18 years;
- the mental health requirement- whether the person is suffering from a mental disorder that is recognised under the Mental Health Ordinance;
- the mental capacity requirement- whether the person lacks mental capacity in relation to whether the person should be accommodated in the relevant hospital or care home;
- whether the restrictions will deprive the person of their liberty;

- the best interest requirement- whether it is a proportionate response necessary for the person to be a detained resident in order to prevent harm to them;
- the eligibility requirement- whether the person meets the eligibility requirements to be deprived of their liberty and whether the person must be detained under the Mental Health Ordinance 2010 rather than the proposed Mental Capacity legislation. The DoLs cannot be used if the person must be detained in hospital under the Mental Health Ordinance 2010;
- the no refusals requirement- whether there is an advance decision to refuse treatment. There will be a refusal if there is a valid advance decision applicable to the person and the relevant treatment as this will override any DoLs process. It is also important to check whether the person who holds an LPA for Health and Welfare agrees with a DoLS authorisation (no refusals).

(j) The Team Manager for Social Service will act as the DoLS authorisations signatory. The DoLS signatory must read the assessments and scrutinise the grounds for authorisation. They may add or remove conditions or shorten the period the authorisation is granted. The maximum period for a standard authorisation is 12 months. The authoriser may request more information from the assessors to support their decision making process.

(k) It is important to note that in terms of section 64(5) of the Mental Capacity Act, any references to deprivation of a person's liberty under that Act has the same meaning as that in Article 5(1) of the European Convention on Human Rights (ECHR). Article 5(1)(e) of the ECHR provides as follows:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants";

The European Court of Human Rights and the UK courts have interpreted Article 5(1) as having three elements, all of which need to be satisfied before a

particular set of circumstances will amount to a deprivation of liberty falling within the scope of this Article which are:

- The objective element: that the person is confined to a particular restricted place for a non-negligible period of time; and
- The subjective element: that the person does not consent (or cannot, because they do not have the capacity to do so) to that confinement; and
- State imputability: that the deprivation of liberty can be said to be one for which the State is responsible[6].

However, the courts have not clarified what constitutes a 'non-negligible' period of time as it appears from the case-law to vary according to the particular circumstances under consideration. In the absence of clear guidance from the courts as to the precise period of time that may constitute a non-negligible period, the UK Law Society recommends that it is open for individual public bodies to set down what they consider to be such a period for their own operational purposes where such may be necessary.[7]

(l) The Deprivation of Liberty Safeguards would not apply if the person is detained under the Mental Health Ordinance. Deprivation of liberty is distinct from any detention under the Mental Health Ordinance because that detention applies to the care and treatment of a person with a mental disorder. A Deprivation of Liberty applies to a person who lacks capacity to consent to the proposed restrictions but does not suffer from any mental disorder and may have capacity to make decisions in other areas of their life.

7.3 Harmonisation between the proposed Mental Capacity and Deprivation of Liberty legislation and existing legislation

7.3.1 The UK Enduring Powers of Attorney Act, 1985

[6] UK Law Society; "*Identifying a deprivation of liberty: a practical guide*"; 18 March 2024; pages 17 to 18; accessed on 21 November 2024 on https://prdsitecore93.azureedge.net/-/media/files/topics/private-client/dols-guidance-2024/full-dols-guidance-updated.pdf?rev=894b431c139a40a9a340bbd6ca967a80&hash=9E54498B862B817540D9CB6FEF9D4DD9
[7] Supra, page 53

This Act is adopted and applies to the Falkland Islands. The Law Revision and Publication Ordinance2017 states that this Act shall continue to be in force as if the Mental Capacity Act 2005 had never been made. The EPA Act introduced and regulated the creation of EPA in the Falkland Islands. The Law Revision and Publication Ordinance 2017 will require amending to remove this Act from applying in the Falkland Islands because the EPA will be replaced by the LPAs in the new legislation. However, in the new Mental Capacity legislation, there will be a need to save the valid existing EPAs that were made under the UK Enduring Powers of Attorney Act.

7.3.2 Statutory Instrument 825 of 2001, The Court of Protection (Enduring Powers of Attorney) Rules 2001

These 2001 Rules were adopted from the UK and apply in the Falkland Islands. The Rules were made in terms of the Mental Health Act 1983. This is because the Court of Protection continued to exist under section 93(2) of the Mental Health Act1983. Rule 2 of the 2001 Rules clarifies that these rules apply to proceedings under the Enduring Powers of Attorney Act 1985. The Law Revision and Publication Ordinance 2017 will require amending to remove these Rules from applying to the Falkland Islands because the EPAs will be replaced by the LPA under the new Mental Capacity legislation. New Court of Protection Rules will need to be developed by the Chief Justice under the new Mental Capacity Ordinance.

7.3.3 Statutory Instrument 1376 of 1990, The Enduring Powers of Attorney (Prescribed Forms) Regulations 1990

These Regulations were adopted from the UK and apply in the Falkland Islands. The Regulations were made under the Enduring Powers of Attorney Act of 1985. The Law Revision and Publication Ordinance 2017 will require amending to remove these Regulations from the list of legislation applying to the Falkland Islands. This is because when the new Mental Capacity legislation commences, the EPAs will no longer be prepared in the future in the Falkland Islands.

7.3.4 *Mental Health Ordinance 2010*

(a) There will be a need to ensure harmonisation of legislation especially between the proposed Mental Capacity legislation with the existing Mental Health Ordinance 2010. The Mental Health Ordinance applies when a person has a mental health problem and it deals with the reception, care and treatment of mentally disordered patients. Section 4(2) of this Ordinance defines "mental disorder" as meaning any disorder or disability of the mind.

(b) The Mental Health Ordinance is used to detain people who have a mental disorder in hospital for assessment and treatment if the person is a serious risk to themselves or others. Under the Mental Health Ordinance, a person can be forced to have treatment relating to their mental disorder whether the person agrees to such treatment or not. So even if a person has mental capacity, they can still be given most treatment for their mental disorder against their will.

(c) On the other hand, the proposed Mental Capacity legislation will apply in instances where a person lacks capacity to make a decision and is intended to promote and protect the decision-making rights of those who may temporarily or permanently lack mental capacity.

(d) In this regard, there might be instances where the two pieces of legislation will interact and clarity will be required on which one takes precedence over the other should that happen.

(e) A person who has a mental disorder and who falls under the Mental Health Ordinance may still be able to have capacity to make their own decisions. In certain instances other people who are governed under the Mental Health Ordinance may lack capacity to make decisions and therefore the proposed Mental Capacity legislation and the Mental Health Ordinance might complement each other under such circumstances. However, there will be a need to clarify that:

- People who lack mental capacity to make specific decisions are still protected by the new Mental Capacity legislation even if they are subject to the Mental Health Ordinance. However, there are three important exceptions:
  - if a person is liable to be detained under the Mental Health Ordinance, decision makers must rely on the provisions of this Ordinance when

making decisions. Therefore, decision makers cannot rely on the proposed Mental Capacity legislation to give mental health treatment or make decisions about that treatment on their behalf;

- if a person can be given mental health treatment without their consent because they are liable to be detained under the Mental Health Ordinance, they can also be given mental health treatment that goes against an advance decision to refuse treatment that is made under the proposed Mental Capacity legislation;
- if a person is subject to guardianship in terms of the Mental Health Ordinance, the guardian has the exclusive right to take certain decisions that will be contained in the guardianship order. In this regard, the powers of Attorneys and Deputies will be limited under such instances;

- The conditions for Community Treatment Order (specified under section 24 of the Mental Health Ordinance) and the Deprivation of Liberty authorisation that will be issued under the proposed Mental Capacity legislation must not conflict if they apply to an individual who is subject to both laws;
- Under the Mental Health Ordinance, subject to certain conditions, doctors can give treatment for mental disorders to detained patients without their consent – whether or not they have the mental capacity to give that consent;
- In certain instances, e.g. section 70 of the Mental Health Ordinance, the proposed Mental Capacity legislation cannot be used to give medical treatment for a mental disorder to patients who lack mental capacity to consent. Nor can anyone else, like an Attorney or a Deputy, be able to use the new Mental Capacity legislation to give consent for that treatment. This is because the Mental Health Ordinance already allows the doctor, if they comply with the relevant rules, to give patients medical treatment for mental disorder even though they have not consented to such treatment;
- The Mental Health Ordinance further regulates medical treatment of a mental disorder for individuals who are liable to be detained under this Ordinance. This may include treatment of physical conditions that is intended to alleviate or prevent a worsening of symptoms or a manifestation of the mental disorder (e.g. a clozapine blood test) or where the treatment

is otherwise part of, or ancillary to, treatment for mental disorder. In other words, if a person is detained under the Mental Health Ordinance, and needs physical health treatment that is related to their mental health problem, then this treatment can be given under the Mental Health Ordinance;

- Where individuals liable to be detained under the Mental Health Ordinance have a physical condition unrelated to their mental disorder, consent to treat this physical condition must be sought from the individual. If the individual does not have the capacity to consent, treatment can be provided under the proposed Mental Capacity legislation as long as it is in their best interest and is unrelated to the person's mental disorder;
- The powers of Attorneys and Deputies will be limited under the Mental Health Ordinance in that they will not be able to:
  - give consent on a patient's behalf for treatment under the Mental Health Ordinance where consent is not required if the patient is liable to be detained under this Ordinance (e.g. in terms of section 70); and
  - take decisions:
    - about where a person subject to guardianship made under the Mental Health Ordinance should live, or
    - that conflict with decisions that a guardian has a legal right to make.

(f) Another review will be done once the draft Mental Capacity legislation has been prepared in order to ensure that the law is harmonised and to clarify any instances where one of the Ordinances will take precedence over the other.

7.3.5 The Assessment and Safeguarding of Adults Ordinance, 2020

(a) The Assessment and Safeguarding of Adults Ordinance makes provision for assessments for the care and support of adults and the assessments for the adult carer's support needs, enquiries and reviews to be carried out in respect of adults; and for the establishment of the Safeguarding Adults Board. This Ordinance seeks to protect adults with needs for care and support from experiencing abuse and neglect.

(b) The Assessment and Safeguarding of Adults Ordinance will complement the proposed Mental Capacity legislation because in instances where the adult lacks capacity to make a decision, the Mental Capacity legislation will be used. Minor amendments, for example under sections 8(2), 11(4) and 16(5) of the Assessment and Safeguarding of Adults Ordinance, will be required to ensure that mechanisms under the Mental Capacity legislation takes precedence where the person lacks capacity to make a decision.

(c) It is proposed that the existing Safeguarding Adults Board established under section 12 of the Assessment and Safeguarding of Adults Ordinance also be used as a strategic statutory body that deals with mental capacity issues under the new Mental Capacity legislation.

7.3.3 Administration of Estates Ordinance 1949

This Ordinance makes provision for the grant of probate and the administration of estates. In instances where there is reference to mental capacity in Schedule 2 under the Administration of Estates Ordinance there is a need to consider whether the cross references to the Assessment and Safeguarding of Adults Ordinance 2020 will need to be changed to refer to the proposed Mental Capacity legislation.

7.3.4 Crimes Ordinance 2014

This Ordinance consolidates and partially codifies the law relating to criminal offences. The Crimes Ordinance 2014 and the proposed Mental Capacity legislation will complement each other because the Crimes Ordinance contains certain acts that will be considered a crime if people who lack mental capacity becomes victims of for example crimes relating to forced marriages and certain sexual activities.

7.3.5 Criminal Procedure and Evidence Ordinance 2014

(a) This Ordinance consolidates and partially codifies the law relating to criminal procedure and evidence and connected purposes.

(b) Code C, section C1, Note 1G, application of the term 'mentally vulnerable' will need to be amended to include reference to the proposed Mental Capacity legislation as well.

(c) There will be a need to cross reference offences introduced under the proposed Mental Capacity legislation to the Criminal Procedure and Evidence Ordinance, e.g. offences relating to ill-treatment or neglect of a person who lacks capacity. Section 620 of the Criminal Procedure and Evidence Ordinance will need to be amended in order to add reference to offences under the proposed Mental Capacity legislation committed by a Donee of a Lasting Power of Attorney; done in terms of an Enduring Power of Attorney or done by a Deputy appointed by the CoP; that relates to the ill-treatment or neglect of a person who lacks mental capacity.

7.3.6 Matrimonial and Civil Partnerships Proceedings Ordinance 1979

(a) The Matrimonial and Civil Partnership Ordinance provides for the conduct of proceedings relating to marriage and civil partnerships and further provides for incidental or connected matters thereof. Section 15 of this Ordinance will need to be amended to provide that a marriage is voidable if it was entered into by a party who lacked capacity to make a decision, as contemplated under the proposed Mental Capacity legislation, at the time of the marriage.

(b) Section 15A of the Matrimonial and Civil Partnerships Proceedings Ordinance will need to be amended to provide that a civil partnership is voidable if at the time of the registration either party lacked mental capacity to make a decision, as contemplated under the proposed Mental Capacity legislation.

(c) Section 28(2)(e) of the Matrimonial and Civil Partnerships Proceedings Ordinance will need to be amended to include lack of mental capacity.

(d) Section 43 of the Matrimonial and Civil Partnerships Proceedings Ordinance will need to be amended in order to make reference to people lacking mental capacity under the proposed Mental Capacity legislation and reference to the

Deputies that will be appointed by the Court of Protection and the Attorneys/ Donee appointed under the LPA by the Donor.

7.3.7 *Court Fees (Waivers) Rules 2024*

There might be a need to amend the Court Fees (Waivers) Rules will need to include the Court of Protection proceedings.

7.3.8 *Savings*

There will be a need to save valid EPAs made under the Enduring Powers of Attorneys Act 1985 and the Receivers/ Receivership Orders that were made under the Enduring Powers of Attorney Act 1985 and the Mental Health Act 1983.

7.4 Convention on the International Protection of Adults

7.4.1 The Convention on the International Protection of Adults, 2000 provides for the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests. This is because people are now living in a global village within which a person might be residing in one or more countries but having assets in other countries.

7.4.2 The Convention avoids conflicts between the legal systems of Contracting Parties in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of adults.

7.4.3 In addition, the Convention ensures that a “power of representation” has force of law in another Contracting Party and enhances co-operation between Contracting Parties. Moreover, the Convention affirms that the interests of the adult and respect for his or her dignity and autonomy are to be primary considerations.

7.4.4 The UK is a member to this Convention but the convention has not been extended to apply to the Falkland Islands. It is recommended that the provisions of this Convention be included into the proposed Mental Capacity legislation as

it outlines acceptable international law when dealing with adults who might lack mental capacity. This will assist in the future, should the Convention be extended to apply to the Falkland Islands, as the legal framework will already be in place.

7.5 Designated Mental Capacity Lead Officer

The proposed legislation will apply to all professionals including doctors, nurses, allied health professionals, social workers, healthcare assistants and care and support staff. These staff and department managers will have a duty to ensure they understand how to apply the law in practice. It will be advisable for each department to have a Mental Capacity lead officer who provides advice on how the legislation works. This could be merged with the current Designated Safeguarding Lead position currently held within each department and will not be a statutory officer.

8. ROLES AND RESPONSIBILITIES

ROLE PLAYER	RESPONSIBILITY
Principal Social Worker –Adults	Project Lead
Principal Social Worker -Adults Legal Policy Adviser	Preparation of drafting instructions
Principal Social Worker -Adults Legal Policy Adviser	Preparation of ExCo report for policy approval
Legislative Drafting Team	Drafting legislation
Crown Counsel (Civil and Safeguarding)	Provision of specialised advice
Executive Council	Approve all of policy
Legislative Assembly	Approval and support of the new legislation

9. POLICY IMPLEMENTATION

In order to achieve the purpose of this Policy, the strategies for its implementation will be adopted and include the following steps:

9.1 an implementation plan with clear action plans, required budget, timeframes and the relevant implementing department has been developed. This plan will be implemented in collaboration with relevant sections within FIG including the Attorney General's Office, KEMH, Tussac House and any formal care setting within the Falkland Islands, the courts and where relevant, the Police;

9.2 the Safeguarding Adults Board will deal with mental capacity strategic matters. The Safeguarding Adults Board will establish a Mental Capacity sub-group consisting of the relevant expertise that will deal with mental capacity issues at a practical level;

9.3 monitoring and evaluation of the Policy to check progress made and the impact. Monitoring and evaluation of the Policy will be done through producing progress annual reports;

9.4 reviewing the Policy as and when required but at least once every five years in order to align the Policy and legal framework with new developments; respond to identified gaps; and determine whether to introduce additional Policy interventions. In addition, there will be a need for continuous monitoring of the UK's newly introduced mental capacity measures to check if they will be relevant within the Falkland Islands context.

Table 1

Function of Office of the Public Guardian under Mental Capacity Act 2005 (s58)	Current Role of the Registrar of the Supreme Court in the Falkland Islands.
establishing and maintaining a register of Lasting Powers of Attorney,	maintains a register of Enduring Powers of Attorney.

establishing and maintaining a register of orders appointing Deputies	maintains registers for receiverships.
supervising Deputies appointed by the court,	Those appointed as receivers must provide annual accounts to the Supreme Court. These are then reviewed by the Acting Judge and, if appropriate, the order for receivership is renewed. General powers to order visitors (detailed below – s102 & 103 MHA 1983)
directing a Court of Protection Visitor to visit (i)a Donee of a Lasting Power of Attorney, (ii)a Deputy appointed by the court, or (iii)the person granting the power of attorney or for whom the Deputy is appointed, and to make a report to the Public Guardian on such matters as he may direct,	S102 & 103 of the Mental Health Act 1983 provides for a Judge to direct a panel of visitors (medical or legal) to visit a patient and make a report as needed to assist the judge in the exercise of their powers.
receiving security which the court requires a person to give for the discharge of his functions,	S107 MHA 1983 deals with this for receivers. The Supreme Court has a separate bank account which is managed between FIG and the Court and the purpose of this account is to hold securities/recognisances/probate estates. It is an independent holding account and complies with the applicable rules of the Supreme Court (it is an interest bearing account).

receiving reports from Donees of Lasting Powers of Attorney and Deputies appointed by the court,	Annual accounts of receivers. S8 Enduring Powers of Attorney Act 1985, gives court general powers once an EPA is registered which includes annual reports/accounts
reporting to the court on such matters relating to proceedings under this Act as the Court requires,	Provisions exist in MHA 1983/EPAA 1985
dealing with representations (including complaints) about the way in which a Donee of a Lasting Power of Attorney or a Deputy appointed by the court is exercising their powers,	Court exercises this oversight under MHA 1983/EPAA 1985
publishing, in any manner the Public Guardian thinks appropriate, any information they think appropriate about the discharge of their functions.	CoP has issued guidance documents on Receiverships and EPAs.
establishing and maintaining a register of guardianship orders,	registers were established and are being maintained.
supervising guardians,	Don't have guardians currently, so no equivalent but refer to supervisory functions court already exercises.
receiving security which the court requires a guardian to give for the exercise of the guardian's functions	
receiving reports from guardians,	
reporting to the court on such matters relating to proceedings under the Guardianship (Missing Persons) Act 2017 as the court requires,	
dealing with representations (including complaints) about the way in which a	

guardian is exercising the guardian's functions, and	
publishing, in any manner the Public Guardian thinks appropriate, information about the exercise of their functions in connection with guardians and guardianship orders.	

REFERENCES

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Assessment and Safeguarding of Adults Ordinance 2020;

Crimes Ordinance 2014;

Criminal Procedure and Evidence Ordinance 2014;

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UK Enduring Powers of Attorney Act 1985;

UK Mental Capacity Act 2005;

UK Mental Health Act 1983.

ANNEX 1- Falkland Islands Government – Mental Capacity in the Falkland Islands Policy

Falkland Islands Government

Health and Social Services Directorate

Mental Capacity in The Falkland Islands

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V1.0	Active	Submitted to SMT for Information	October 2023
V1.1	Review	Reviewed policy to take into account newly introduced Deprivation of Liberty, Use of Restraint and Restrictive Practice Policy	7th March 2024
V1.1	Reactivated		March 2024

Contents

1. Context and principles

1.1 Context

The Mental Capacity Act 2005 (MCA) and the accompanying Mental Capacity Act 2005 Code of Practice protects people's rights to make decisions, and their right to have decisions made in their best interest if they lack capacity to make a specific decision.

The Falkland Islands does not currently have specific legislation in regard to mental capacity therefore this policy is based on good practice recognised within the Mental Capacity Act 2005 (MCA) and the Mental Capacity Act 2005 Code of Practice.

Everyone working with and/or caring for an adult who may lack capacity to make particular decisions must comply with this policy.

The Falkland Islands Government uses this policy to ensure it protects people's decision making rights and acts in their best interest where required.

1.2 Principles

There are five statutory principles which underpin the values and legal requirements of the MCA and these are reflected in this policy

The Falkland Islands Government is informed by and uses the five principles to guide all its interactions, and to deliver care and support.

The five principles are:

1. A person must be assumed to have capacity unless it is established that they lack capacity
2. A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success
3. A person is not to be treated as unable to make a decision merely because they make an unwise decision
4. An act done, or decision made, under this policy, for or on behalf of a person who lacks capacity, must be done, or made, in their best interest
5. Before the act is done, or the decision is made, regard must be had as 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.

All professionals will use the five principles to respect service user's rights to make a capacitated decision, protect service users who lack capacity and help them as much as possible to take part in decision making which affects them. Chapter 2 of the MCA Code of Practice contains helpful further guidance a summary of which is set out below:

- Every adult has the right to make their own decisions if they have the capacity to do so. Family, carers and health or social care staff must assume that a person has the capacity to make decisions unless it can be established that the person does not have capacity
- People should receive support to help them make their own decisions. Before concluding that individuals lack capacity to make a particular decision, it is important to take all possible steps to try to help them reach a decision themselves
- People have the right to make decisions that others might think are unwise. A person who makes a decision that others think is unwise should not automatically be labelled as lacking the capacity to make a decision
- Any act done for, or any decision made on behalf of, someone who lacks capacity must be in their best interest
- Any act done for, or any decision made on behalf of someone who lacks capacity should be an option that is less restrictive of their basic rights and freedoms, as long as it is in their best interest

(The MCA Code of Practice 2007)

2. Assessment of Capacity

2.1 Helping Service Users to Make Their Own Decisions (Maximising Capacity)

The Falkland Islands Government will assume a service user has capacity unless it is established that they lack capacity and take all practicable steps to enable a service user to make a decision, before deciding that they may lack capacity.

A service user's capacity, or lack of capacity refers **specifically to their capacity to make a particular decision at the time it needs to be made**. All staff must make sure all assessments of capacity are decision specific and considered at the time the decision needs to be made.

This policy is dedicated to helping people make their own decisions, therefore it is the responsibility of health and social care professionals to provide all appropriate help to maximise opportunities for the individual to demonstrate mental capacity.

Falkland Islands Government employees will:

- Provide the service user with all the relevant information they require to make a decision, including information on the choices and alternatives available to them
- Consider how the service user communicates and present the information about the decision in a way that the service user finds easiest. This could be by using simpler language or visual aids. Consideration should also be given as to whether anyone else help with communication such as family, interpreter, advocate or speech and language therapist
- Consider any day and/or times when the service user's understanding is better. Think about the environment, where would the service user feel most at ease
- Who is the best person to support the service user to make the decision or express their view
- Consider whether the decision needs to be made. Can the decision be put off to a later time when the service user may be better able to make the decision?

2.2 Making Unwise Decisions

Everyone has a right to make their own decisions where they have capacity to do so, and the Falkland Islands Government will ensure that its service users' right to make a capacitated decision is respected, even if others believe their decision is unwise.

This will make sure its service users' freedom to determine their actions and retain control over their own lives is respected.

2.3 Assessing Capacity

The Falkland Islands Government will always presume a service user has the capacity to make a particular decision at the time it needs to be made. The Falkland Islands Government will also ensure staff understand that capacity *must* be assessed in relation to a specific decision, and at the time that decision needs to be made.

Staff must treat service users equally. This means that a service user's capacity must not be judged on their appearance, age, disability, condition or an aspect of their behaviour. It is also important to note that a service user may lack the capacity to make a decision about one issue, but not about others.

These basic tenets must be understood, respected and incorporated into the Falkland Islands Government practice, at every level, by all members of staff. Anyone who claims that an individual lacks capacity should be able to provide evidence. They need to show, that, on the balance of probabilities, the individual lacks the capacity to make a particular decision, at the time it needs to be made. This means being able to show that it is *more likely than not* that the person lacks capacity to make the decision in question. All staff involved in assessing, care planning or delivery of care and support should be trained in assessing capacity. A service user's mental capacity to make specific decisions will form part of their assessment of need. Where there is a concern that a service user lacks the capacity to make a particular decision, a time and decision specific mental capacity assessment will be carried out. The outcome of any mental capacity assessment will be included in the service user's care plan to ensure our staff are supported by the right guidance and instructions on how best to support the service user.

Health and social care professionals will always seek to maximise the service user's capacity to make day to day decisions, such as what they want to wear, what they want to eat and drink, what time they want to get up and go to bed. They will explain the options to the service user using visual aids (e.g. showing alternative clothing or meal choices) where required, to support the service user's ability to make their own decision.

Where a service user has been assessed as lacking the capacity to make a specific decision, a best interest decision will be carried out (See 4.1). Health and social care professionals should still seek to involve the service user in day to day decisions as much as possible to ensure their views and wishes remain central to their care and support.

2.4 The Two-Stage Mental Capacity Assessment

The person who assesses the service user's capacity will usually be the person directly involved with the service user at the time the decision needs to be made. For instance, a care worker might assess the service user's capacity to agree to support with showering or bathing, whilst the community nurse might assess whether the service user can consent to have a dressing changed.

Therefore, all management and care and support staff should be trained and competent in understanding capacity This is because different staff will be involved in assessing someone's capacity to make different decisions, at different times, on a day-to-day basis. The training will ensure that staff understand the principles of mental capacity and how to apply this policy to ensure people's decision making rights are protected. Training should also include communication skills to ensure staff understand how best to support a service user to maximise their ability to make a decision. If staff have any concerns about their ability to effectively communicate with a service user in relation to decision making, they must escalate this to their line manager who will seek advice and support from an appropriate health or social care professional such as the Adult Social Worker or Chief Nursing Officer.

To help determine if a person lacks the capacity to make a particular decision at the time it needs to be made, this policy sets out a two-stage test of capacity, which should be undertaken using the appropriate mental capacity assessment forms. Please see Appendix 1.

The two-stage test is as follows:

Stage 1: Does the person have an impairment or a disturbance in the functioning of their mind or brain. If the person does NOT have such an impairment or disturbance, they will not lack capacity and the assessment should stop.

Examples of impairment or disturbance include:

- Conditions associated with some forms of mental illness
- Dementia
- Significant Learning Disabilities
- The long-term effects of brain injury
- Physical or mental conditions that cause confusion, drowsiness or loss of consciousness
- Delirium
- Concussion following a head injury
- The symptoms of alcohol or drug use.

Stage 2: Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?

For a person to lack capacity to make a decision, the impairment or disturbance must affect their ability to make the specific decision when they need to. But first people must be given all practical and appropriate support to help them make the decision for themselves

Stage 2 can only apply if all practical and appropriate support to help the person make the decision has failed.

A person is unable to make a decision if they cannot:

- Understand relevant information about the decision to be made
- Retain that information in their mind
- Use or weigh up that information as part of the decision-making process
- Communicate their decision (by talking, sign language or any other means)

If a service user is not able to do one of the first three points (understand, retain, weigh up), they will lack the capacity to make the decision. The fourth point only applies in situations where a service user cannot communicate their decision in any way.

3 Guidance for staff on assessing a service user's ability to make a decision.

3.1 Before the Mental Capacity Assessment

- Start by assuming the service user has the capacity to make the specific decision. Is there anything to suggest the service user cannot make their own decision
- Provide all possible support to enable the service user to make the decision
- Remember people have the right to make unwise decisions if they have the mental capacity to do so. Consider whether your values and beliefs are impacting your professional judgement in relation to what you believe is an unwise decision
- Consider whether the decision can be delayed to take time to help the service user make the decision, or to give the service user time to regain the capacity to decide for themselves.

3.2 During the Mental Capacity Assessment

During the mental capacity assessment, it is the responsibility of the member of staff to determine whether the service user has the capacity to make a specific decision at a specific time. Anyone can assess another person's mental capacity especially in relation to day-to-day decisions and simple decisions.

To make this determination it is good practice to use the attached Mental Capacity Assessment Form (Appendix 1)

Be aware that the fact that a service user agrees with you or accepts what is proposed does not necessarily mean that they have the capacity to make the decision.

3.3 Temporary, Fluctuating or Regaining Capacity

Factors that may indicate that a person may regain capacity in the future:

- The cause of the lack of capacity can be treated, either by medication or some other form of treatment or therapy
- The lack of capacity is likely to decrease in time (e.g., where it is caused by the effect of medication or alcohol or following a sudden shock)
- A person with intellectual disabilities may learn new skills or be subject to a new experience which increases their understanding and ability to make certain decisions
- The person may have a condition that causes capacity to come and go at various times (such as some forms of mental illness) so it may be possible to arrange for the decision to be made during a period when they do have capacity
- A person previously unable to communicate may learn a new form of communication
- Capacity may fluctuate depending on the time of day, seasons and other environmental factors.

3.4 Complex Decisions

In some complex cases it may be appropriate to seek specialist advice. This may be the GP, a specialist, a social worker, a speech and language therapist and, in some cases, a multidisciplinary team. This is because complex or major decisions may have serious consequences for a service user.

3.5 Record of a Service user's Capacity to Consent

A Mental Capacity Assessment should be recorded in accordance with your departmental record keeping process when there is a concern a service user is not able to make a specific decision at the time it needs to be made. These will inform the service user's care plan and be part of the care plan review.

It is important to review capacity assessments regularly or if there is a significant change in circumstance, such as the possibility of change in capacity.

Minor day to day decisions such as what to wear, eat or drink do not require a record of the assessment of capacity. Instead, care workers will complete records in the daily notes of the steps they take to maximise and support service user's to make the specific decision and any decisions they make as part of the day to day care in the service user's best interest.

3.6 Professional Records

When professionals carry out an assessment of a service user's capacity to consent or make a decision, the relevant professional records are kept in the service user's plan.

3.7 Challenging a Finding of Lack of Capacity

When a situation arises that a service user, family, appointed representative or other professional challenges the result of the assessment of capacity, the first step is to raise the matter with the person who carried out the assessment. If the service user has been assessed to lack capacity, they should have support from family, friends or a representative.

- The assessor must give the reason why they consider the person lacks capacity to make the decision and provide objective evidence to support their conclusion
- The assessor must show they have applied the principles laid out in this policy
- If possible, a second opinion from an independent professional or expert in assessing capacity should be sought
- If the disagreement cannot be resolved the person who is challenging the assessment can seek independent legal advice.

4. Decision Making

4.1 Best Interest Decisions

This policy is based on good practice recognised within the Mental Capacity Act 2005 (MCA). Principle 4 of the MCA 2005 is that any decision made on behalf of a person who lacks capacity must be done or made, in that person's best interest.

The Falkland Islands Government follows these principles:

- For most day-to-day actions or decisions, the decision maker will be the care worker most directly involved in service user care as recorded in the care plan
- Where a decision involves the provision of medical treatment, the GP or other health care staff are the decision makers. All decisions are recorded in the care plan
- Where nursing or paid care is provided, the nurse or paid carer will be the decision-makers
- If an Enduring Power of Attorney (EPA) has been made, the attorney will be the decisionmaker, for decisions within the scope of their authority.

Whenever possible, the person who lacks capacity will be involved in the decision-making process. Best interest decisions must never be based on discriminatory views or assumptions and must always consider whether the service user might regain capacity, and if so, could the decision be delayed.

Consideration must be given to whether the adult will have substantial difficulty being involved in the decision-making process. It may be appropriate for a representative to be appointed to listen to the adult, provide information and explain options, assisting the adult to reach their own decisions and support or represent them in expressing their views regardless of capacity. Any representative should always support the adult at risk's view regardless of whether they agree with those views or not.

A best interest record (see Appendix 2) is kept in the service user's file and includes:

- What the decision was
- How the service user was supported to participate in the decision making
- What relevant circumstances were taken into account to make the decision
- What the service user's views are
- Who was consulted to help work out best interest
- What particular factors were taken into account
- Whether there are there any less restrictive options
- What the reason for reaching the decision was

Where a major best interest decision is required departments work in partnership with relevant professionals who are likely to be the most appropriate decision makers.

4.2 Protection for Staff

This policy allows care workers and other health and social care staff to carry out certain tasks in the best interest of the service user who lacks capacity.

However, it is the responsibility of the worker to;

- Check whether the service user has the capacity to consent
- Apply the two-stage test where necessary

- Act in the service user's best interest
- Understand the limitations on protection for staff in relation to deprivation of liberty, restraint or restrictive practice.
- Not pay for goods or services using the service user's money unless there is formal authority to do so.

4.3 Making lawful decisions – Ensuring consent is lawful and informed

The Falkland Islands Government will always ensure consent is lawful and informed.

Consent should always be sought from the service user where they have capacity to make a specific decision. Where a service has the capacity to consent the Falkland Islands Government will always respect their decision, including refusal of consent.

Helping a service user to make their own decisions directly relates to the principles laid out in this policy of assuming capacity and taking all practicable steps to enable a service user to make a decision, before deciding that they may lack capacity. Staff must ensure they support service user's to consent to a decision by:

- Providing all relevant information needed to make a decision, including information on the choices and alternatives available to them
- Considering communication needs and presenting information about the decision in a way that the service user finds easiest
- Seeking assistance when appropriate to support communication including an interpreter, speech and language therapist or family member
- Consider any day and/or times when the service user's understanding is better.
- Think about the environment, where would the service user feel most at ease
- Consider who the best person may be to support the service user to make the decision
- Consider whether the decision needs to be made now or whether it can wait until the service user may be better able to make the decision.

Where a service user lacks capacity to consent, the Falkland Islands Government will check whether there is another person with lawful decision-making authority. This may include someone with an Enduring Power of Attorney.

Where a service user lacks capacity and there is no one else with lawful decision-making powers, the Falkland Islands Government will ensure that best interest decisions are made following the principles laid out in this document to protect service users' rights and ensure they continue to be at the heart of decision making (see best interest decisions above).

Finally, where there are conflicts, or a decision has not been able to be made, legal advice should be sought.

4.4 Next of Kin (NoK)

This term is commonly used and there is a presumption that the person identified has certain rights and duties.

Health and social care colleagues should always consult the people closest to a person who lacks the capacity to understand that person's wishes and feelings to help with best interest decision making.

However, the person identified as NoK should not be asked to sign and/or consent to certain interventions.

4.5 Independent Advocacy

This Falkland Islands Government should consider whether the service user will have substantial difficulty participating in the decision making process and whether, in the absence of other representation, such as family members, an advocate should be appointed to listen to the adult, provide information and explain options.

Independent advocacy should be sought in cases where:

- The person who lacks capacity has no close family or friends to take an interest in their welfare
- Family members disagree about the person´s best interests
- Family members and professionals disagree about the person´s best interests
- There is a conflict of interest for people who have been consulted in the best interest assessment (e.g., the sale of family property where the person lives)
- The person who lacks capacity is already in contact with an advocate
- The proposed course of action may lead to the use of restraint or other restrictions on the person who lacks capacity
- There is a concern about safeguarding.

Any representative or advocate should always support the adult at risk's view regardless of whether they agree with those views or not.

4.6 Advance Care Planning

An Advanced Care Plan enables someone over the age of 18 with the capacity to refuse specified treatment for a time in the future when they may lack the capacity to consent to or refuse the treatment.

If a service user has made an advance care plan to refuse treatment the advance care plan is kept in their file and health care staff must be informed and they should respect this decision if it is valid and applies to the proposed treatment.

5.0 Use of Restraint and Restrictive Practice

5.1 Use of Restraint and Restrictive Practice

The Falkland Islands Government Deprivation of Liberty, Use of Restraint and Restrictive Practice Policy provides guidance to staff in the use of restraint and restrictive practice and under what circumstances a person would be considered to be deprived of their liberty.

It is important to note for the purposes of this policy that staff are using restraint or restrictive practice if they:

- Use force or threaten to use force to make someone do something that they are resisting, or,
- Restrict a person´s freedom of movement, whether they are resisting or not.

Restraint can be physical, medical and mechanical.

The use of restraint must always be justified and documented.

It is the responsibility of all staff when using restraint for adults who lack capacity to adhere to the following two conditions:

- the person taking action must reasonably believe that restraint is *necessary* to prevent *harm* to the service user who lacks capacity, and
- the amount or type of restraint used and the amount of time it lasts must be a *proportionate response* to the likelihood and seriousness of the risk of harm.

The use of restrictions, restraint and physical interventions with service users will only occur where there is a need to protect the service user, staff or bystanders from harm and only where there are no other appropriate alternative strategies.

The intervention used must be used as the last possible option and with the least amount of restraint or restriction, and for the shortest time necessary to prevent harm to the person or others. The action must be detailed within the care and support plan and be administered only by appropriately trained and competent staff, and neither intervention nor the threat of intervention should ever be used as a form of punishment.

Where restraint of any kind has been used this must be escalated to the manager of the service, recorded within the care notes, including date, time, duration, type of restraint, reason, staff members involved in the incident, and any other relevant information.

If the service user or staff member or others are injured then an incident form must be completed, and the manager of the service informed immediately.

Staff must refer to and follow the Falkland Islands Deprivation of Liberty, Use of Restraint and Restrictive Practice Policy.

5.2 Deprivation of Liberty

The Falkland Islands Government is aware of the restrictive factors that indicate a service user is or is at risk of being deprived of their liberty. In accordance with the principles of this policy any decision to deprive a service user of their liberty must be considered the least restrictive option and clearly documented as to why a deprivation of liberty is considered to be in the individual's best interest.

Appendix One – Mental Capacity Assessment Form

Mental Capacity Assessment

The Mental Capacity Act 2005 states that **anyone** can assess another person's mental capacity especially in relation to day-to-day decisions and simple decisions. The Falkland Islands does not currently have specific legislation in regard to mental capacity therefore this policy is based on good practice recognised within the Mental Capacity Act 2005 (MCA).

Assessors must abide by the following **five statutory principles** which are as follows:

1. A person must be **assumed** to have capacity unless it is established that he/she lacks capacity (by undertaking capacity assessment).

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

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

4. 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 his/her **best interest**.

5. Before the act is done, or 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.

Person's Details		
Name		
Address		
Date of Birth		
Date of Assessment		
Do you need anyone else to provide information or give their opinion?	Yes	No
Do you need to involve anyone to help you to communicate with the person?	Yes	No

Please give the name and status of anyone who assisted with this assessment (Please include Representative details if one is involved)		
Name	Status	Contact Details

<u>Decision Requiring Assessment of Mental Capacity</u> (provide details)

NB: Before deciding that someone lacks capacity to make a particular decision, it is important to take all practical and appropriate steps to enable them to make that decision themselves.

What is the Decision?

STAGE 1 – Determining an impairment of disturbance to the mind or brain

NB- If a person does not have an impairment or disturbance of the mind or brain, they will not lack capacity under the Mental Capacity in the Falkland Islands Policy				
Does the individual have an impairment or a disturbance in the functioning of their mind or brain?	Yes		No	
What are the individuals presenting condition?				
Unconsciousness				
Autism Spectrum Disorder				
Mental Health Issues				
Other cognitive impairment e.g., Stroke				
Dementia				
Learning difficulties / disabilities				
Acquired brain injury				
Other (please specify)				

If you have answered **Yes** to Stage 1, **PROCEED TO STAGE 2**

If you have answered **NO** to Stage 1, there is no such impairment or disturbance and thus **THE PERSON DOES NOT LACK CAPACITY** within the meaning of the Mental Capacity in the Falkland Islands Policy

Sign/date form, record the outcome within the person's case records

DO NOT PROCEED ANY FURTHER

Having determined an impairment or disturbance in the functioning of the person's mind or brain? (Stage 1), you now need to complete your assessment and form your opinion as to whether the impairment or disturbance means that the person is unable to make the decision at the time the decision needs to be made?

Every effort must be made to provide the relevant information in a way that is most appropriate to help the person understand it. For example, easy read leaflets, large print, enabled the person to be at ease, consider the location and timing; relevance of information communicated; the communication method used; and the involvement of others.

Describe the practical actions and steps you have taken to assist the person to make this specific decision.

1. Is the person able to understand the information relevant to the decision to be made? *Do they understand the nature of the decision? The reason why the decision is needed? The likely effects of deciding one way or another, or making no decision at all?*			Evidence
	Yes		
	No		
2. Is the person able to retain the information for long enough to make an effective decision? *People who can only retain information for a short while must not be automatically assumed to lack the capacity to decide – it depends on what is necessary for the decision in question. Different methods may be needed to help someone retain information e.g. written information*	Yes		
	No		
3. Is the person able to use or weigh up the information as part of the decision-making process? *Sometimes people can understand information however they should be able to understand the advantages and disadvantages of the decision to be made.*	Yes		
	No		
	Yes		

4. Is the person able to communicate their decision? *All steps must be taken to aid communication. Communication does not need to be verbal.*	No		

Stage 2 – Assessment

NB: If a person cannot do one or more of these four things, they are unable to make the decision.

Outcome of Mental Capacity Assessment

On the balance of probabilities, there is a reasonable belief that:

The person **has** capacity to make this decision currently	
The person **does not have** capacity to make this decision currently	

If the person is considered, on the balance of probability, to HAVE the mental capacity to make this decision now. Sign/date this form and record the outcome within the person's case records. **Do not proceed to the best interest decision.**

If you have answered NO to any of the questions, proceed to the Best Interest **Best Interest Decision**

- To be completed when an assessment of capacity has identified that the person does **NOT** have the capacity to decide on a specific issue
- ALL questions must be answered fully and evidence given to support the response.
- Reference must be made to Mental Capacity in the Falkland Islands policy.

Best Interest Decision						
Describe the decision to be made						
1. Has the person made an Advance Decision that may be valid and applicable to some or all of the treatment?	Yes*		No		Not known	
*If Yes, is it valid and applicable to this decision?	Yes		No		If you are unsure, please seek advice	

2. Does the person have appointed an attorney under an Enduring Power of Attorney for) Property and finances decisions?	Yes		No		Not known	
Is there a court appointed Receiver?	Yes*		No		Not known	
* If yes you will need to consult with the EPA/Receiver as they may be the decision maker and take a copy for your records.						
3. Does the person have someone who is willing and able to support them? *If yes, please state	Yes*		No			
a) Name						
b) Relationship						
4. What practical steps have been made to ensure that the person is helped to participate as fully as possible in the decision making? For example, easy read leaflets, large print, enabled the person to be at ease, consider the location and timing; relevance of information communicated; the communication method used; and the involvement of others?)						
5. What is the person's past and present wishes in relation to this decision?						
6. What are the person's beliefs and values that would be likely to influence this decision?						
7. What other factors would they consider?						
8. What are the views of significant others? *(State who was consulted and their relationship to the person)*						
Best Interest Decision Summary						

1. What is the decision that has been made in the person's best interest (e.g. evidence using a balance sheet approach to consider and evidence the benefits and risks of each available option)?
2. Record the reasons why this decision is in the person's best interest
3. Document how this is the least restrictive option?

I have reached the "Best Interest Decision" in accordance with the principles and requirements of the Mental Capacity in the Falkland Islands Policy

Signature			
Print Name			
Date		Time	
Job title/Status			
Contact			
Date for review of Best Interest Decision			

<u>Details of Assessor:</u>

Assessor		Signature	
Designation		Date	
Date of next review		Time	

Appendix Two – Best Interest Decision Making Document

Best Interest Decision

1. To be completed when an assessment of capacity has identified that the person does **NOT** have the capacity to decide on a specific issue
2. ALL questions must be answered fully and evidence given to support the response.
3. Reference must be made to Mental Capacity in the Falkland Islands policy.

Best Interest Decision						
Describe the decision to be made						
1. Has the person made an Advance Decision that may be valid and applicable to some or all of the treatment?	Yes*		No		Not known	
*If Yes, is it valid and applicable to this decision?	Yes		No		If you are unsure, please seek advice	
2. Does the person have appointed an attorney under an Enduring Power of Attorney for) Property and finances decisions?	Yes		No		Not known	
Is there a court appointed Receiver?	Yes*		No		Not known	
* If yes you will need to consult with the EPA/Receiver as they may be the decision maker and take a copy for your records.						
3. Does the person have someone who is willing and able to support them? *If yes, please state	Yes*		No			
a) Name						
b) Relationship						
4. What practical steps have been made to ensure that the person is helped to participate as fully as possible in the decision making? For example, easy read leaflets, large print, enabled the person to be at ease, consider the location and timing; relevance of information communicated; the communication method used; and the involvement of others?)						
5. What is the person's past and present wishes in relation to this decision?						
6. What are the person's beliefs and values that would be likely to influence this decision?						
7. What other factors would they consider?						

8. What are the views of significant others? *(State who was consulted and their relationship to the person)*
Best Interest Decision Summary
1. What is the decision that has been made in the person's best interest (e.g. evidence using a balance sheet approach to consider and evidence the benefits and risks of each available option)?
2. Record the reasons why this decision is in the person's best interest
3. Document how this is the least restrictive option?

I have reached the "Best Interest Decision" in accordance with the principles and requirements of the Mental Capacity in the Falkland Islands Policy

Signature	
Print Name	

Date		Time	
Job title/Status			
Contact			
Date for review of Best Interest Decision			

Annex Two – Falkland Islands Government – Deprivation of Liberty, Use of Restraint and Restrictive Practice Policy

Deprivation of Liberty, Use of Restraint and Restrictive Practice Policy

Author: Samantha Lowe – Principal Social Worker (Adults)

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V1	Active	Approved by ExCo April 2024. Added to Q-Pulse May 2024	May 2024

TABLE OF CONTENTS

Related Documents:

Statement of Purpose and Standards of Care for all Community Care within the Falkland Islands
Safeguarding Adults in the Falkland Islands – Policy
Safeguarding Adults in the Falkland Islands – Guidance for Professionals
Mental Capacity Policy
Positive Behaviour Support Policy

INTRODUCTION

1 PURPOSE

The Falkland Islands Constitution Order 2008 establishes a right to Personal Liberty (S5) and Freedom of Movement (S8). Any interference with those rights must be lawful.

The purpose of the policy is to provide Falkland Islands Government (FIG) employees with accurate information to consider when the use of deprivation of liberty, restraint or restrictive practice is occurring and to understand what additional safeguards are required to ensure individuals rights are protected.

The policy does not apply to those detained under the Mental Health Ordinance 2010.

It is necessary for all professionals employed by the Falkland Islands Government[8] in the care and support of adults familiarise themselves with this policy.

2 BACKGROUND

The Islands Plan 2022-2026 seeks to 'modernise national equalities policies and practices, and champion social equity values' to 'grow an environment where discrimination is challenged, people feel they are treated fairly and are protected from discriminatory practices and behaviours.'

This policy provides additional safeguards for adults in need of care and support throughout the community and aims to ensure that best practice is followed in terms of any proposed restrictions, providing guidance that is specific to the Falkland Islands.

The policy follows principles of best practice and is line with professional codes of conduct and standards.

3 SCOPE

The Deprivation of Liberty, Use of Restraint and Restrictive Practice policy will apply to anyone;

- Aged 18 and over, *and*
- who suffers from an impairment or a disturbance in the functioning of their mind or brain, *and*
- who lacks the capacity to give informed consent to the arrangements for their care and/or treatment, *and*
- for whom deprivation of liberty, restraint or use of restrictive practice is considered to be necessary in their best interest to protect them from harm. It is relevant to all care and support settings including;

- Hospital
- Residential Facilities
- Sheltered Housing
- Supported Living
- Day Care Provision

There may be individual cases where a person is deprived of their liberty in their own home, in such cases separate guidance should be sought from Social Services Department.

This policy should be read and understood by all employees involved in the care and support of adults in the Falkland Islands on behalf of the Falkland Islands Government.

When all other less restrictive alternatives have been attempted the use of deprivation of liberty, restraint or restrictive practice should only ever be used as a last resort and then only for the shortest possible time.

[8] Falkland Islands Government employees includes those employed on a permanent basis by the government and those employed indirectly by the Falkland Islands Government such as on a contract or agency basis.

The policy and associated guidance should be read in conjunction with The Falkland Islands Mental Capacity Policy and also the Positive Behaviour Support policy.

All practical and reasonable steps should be taken to avoid deprivation of liberty, use of restraint or restrictive practice but where such practice is occurring that is not itself a statement on the standards of care. Deprivation of liberty, restraint and use of restrictive practice will exist in care and support environments of the highest standard.

3.1 DEPRIVATION OF LIBERTY

There are some circumstances in which depriving a person, who lacks capacity to consent to the arrangements made for their care or treatment, of their liberty is necessary to protect them from harm, and is in their best interest. If a person is being deprived of their liberty it is necessary to follow the referral procedure outlined within this policy.

At the current time the Falkland Islands does not have legislation in place in relation to deprivation of liberty. For the purpose of this policy the definition of deprivation of liberty is as follows;

A Deprivation of Liberty occurs when a person is deprived of their liberty which can be summarised through what is called the "acid test"[9]:

(i) A person is subject to continuous supervision and control *and* (ii) That person is not free to leave the place where they are.

A decision made about how a person is treated and/or cared for on any one occasion is unlikely to mean they are being deprived of their liberty. For example, periodically restraining someone in order to give them vital care or treatment does not alone amount to them being deprived of their liberty.

The decision that someone meets the 'acid test' may flow from the following factors;

- planned restraint is used, including sedation, to admit a person to a care setting where that person resists admission
- the Falkland Islands Government exercises complete and effective control over the care and movement of a person for a significant period
- the Falkland Islands Government exercises control over assessments, treatment, contacts and residence
- a request by family members or other informal carers for a person to be discharged, contrary to the person's care and support plan is declined
- the person is unable to maintain social contacts because of restrictions placed on their access to other people
- the person loses autonomy because they are under continuous supervision and control

Deprivation of Liberty must only occur if it is necessary and proportionate, in the person's best interest and be the least restrictive option available to ensure their safety and well-being. Where a person does not have mental capacity to agree to such measures it is necessary to implement additional safeguards to ensure the individuals rights are upheld.

[9] Cheshire West and Chester Council v P [2014] UKSC 19

3.2 RESTRAINT AND RESTRICTIVE PRACTICE

The Falkland Islands Mental Capacity Policy permits some restraint and restrictions to be used – but only if;

- It is a proportionate response to the likelihood and seriousness of the harm, and

- All other less restrictive means of achieving this have been tried and therefore they are in a person's best interest.

Restrictive interventions are defined as 'deliberate acts on the part of other person(s) that restrict an individual's movement, liberty and/ or freedom to act independently in order to:

- Take immediate control of a situation only where there is a real possibility of harm to the person or others if no action is undertaken; *and*
- End or reduce significantly the risk of harm to the person or others; *and*
- Contain or limit the person's freedom.

3.3 WHEN MIGHT RESTRAINT OR RESTRICTIVE PRACTICE BECOME A DEPRIVATION OF LIBERTY?

There is no simple definition of deprivation of liberty. The difference between restraint or restrictive practice and deprivation of liberty is one of degree or intensity. It may be helpful to envisage a scale which moves from restraint and restrictive practice to deprivation of liberty (Appendix One). Where an individual is on the scale will depend on the circumstances of the individual and may change over time.

Appropriate use of restraint for a short time, in accordance with the Falkland Islands Mental Capacity Act is not unlawful and is not a deprivation of liberty. If you use restraint frequently and you have made other decisions that significantly restrict a person's liberty, you should consider whether the person's liberty is being deprived. You should always make these decisions in consultation with professionals, members of the person's family, and/or relevant representatives and advocates. When considering whether the use of restraint or restrictive practice constitutes a deprivation of liberty the 'acid test' (para 3.1) must be considered.

Guidance on when might restraint become a deprivation of liberty can be seen in Appendix Two.

DETAILS SECTION

4 MENTAL CAPACITY

The Falkland Islands Mental Capacity Policy has been developed to protect people's rights to make decisions, and where it is established the person lacks capacity, their right to have decisions made in

their best interest. Everybody working with adults who may lack mental capacity is required to comply with the Falkland Islands Mental Capacity Policy.

There are five statutory principles which underpin the values and principles of the Falkland Islands Mental Capacity Policy. The Falkland Islands Government is informed by and uses these five principles to guide all its interactions, and to deliver care and support.

The five principles are:

1. A person must be assumed to have capacity unless it is established that they lack capacity
2. A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success
3. A person is not to be treated as unable to make a decision merely because they make an unwise decision
4. An act done, or decision made, under this policy, for or on behalf of a person who lacks capacity, must be done, or made, in their best interest
5. Before the act is done, or the decision is made, regard must be had as 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.

A mental capacity assessment can be triggered in one of many ways following the establishment of a need for the person to make a specific decision e.g. the person's behaviour circumstances or previous issues suggests they may lack capacity or someone else has raised concerns.

Assessment of capacity can usually be made by any professional, however where the decision relates to deprivation of liberty, restraint or restrictive practice it is recommended the initial mental capacity assessment be completed by a registered professional e.g. nurse, occupational therapist, doctor or social worker. The mental capacity assessment should be undertaken using guidance contained within the Falkland Islands Mental Capacity Policy (s2.4). Wherever possible, and always in cases involving deprivation of liberty the Two Stage Test must be completed as detailed within the Falkland Islands Mental Capacity Policy.

If the Best Interest Decision is to deprive the person of their liberty it will be necessary to complete the Falkland Islands Best Interest Decision documentation as detailed within the Falkland Islands Mental Capacity Policy.

If the Best Interest Decision is for the use of restraint or restrictive practice, and it is anticipated that this need will continue, then it is likely this will go beyond 'mere' restraint to a deprivation of liberty. In this case the Falkland Islands Best Interest Decision documentation should always be completed. As defined within the Falkland Islands Government Mental Capacity Policy, the Best Interest Decision should take into account the view of relevant professionals involved in the care and support of the individual at that time.

5 BEST INTEREST DECISIONS

In reaching a best interest decision you must;

- Involve the person who lacks capacity as much as practically possible
- Consider the person's past and present beliefs, values, wishes and feelings
- Take into account the views of carers, relatives, friends and advocates

- Consult others who are involved in the person's care and well-being (with either a formal meeting or via telephone if relatives/carers cannot attend in person or time is of the essence)
- Consider whether the patient will regain capacity sometime in the future in relation to the decision required
- Do not base the decision solely on age, appearance, behaviour or condition.

When reaching a Best Interest Decision regarding deprivation of liberty, restraint or restrictive practice the decision maker must be able to balance the individual's right to liberty with their right to safety detailing how the course of action proposed is the least restrictive option, proportionate to the likelihood and severity of harm and agreed to be in the person's best interest. All best interest decisions must be documented in the person's patient or care and support records (Falkland Islands Mental Capacity Policy, s4.1).

6 USE OF RESTRAINT AND RESTRICTIVE PRACTICE

The Falkland Islands Mental Capacity Policy allows for restraint or restrictive practice to be used on a person who (a) lacks capacity, where (b) it is reasonably believed to be necessary and proportionate to protect them from harm.

Restraint and restrictive practice must be used as the last possible option and in the least restrictive way and for the shortest amount of time. Anybody considering using restraint or restrictive practice must have objective reasons to justify that restraint is necessary. They must be able to show that the person being cared for is likely to suffer harm unless proportionate restraint is used.

Where restraint or restrictive practice of any kind has been used this must be escalated to the manager of the service, recorded within the care and support notes, including date, time, duration, type of restraint, staff members involved, and why this course of action was considered necessary to prevent harm to the person, , and that this action was a proportionate response to the likelihood and seriousness of the risk of harm.

Professionals must not use restraint just so that they can do something more easily. The action must be completed only by appropriately trained staff.

Intervention or the threat of intervention should NEVER be used as a form of punishment.

The Falkland Islands Positive Behaviour Policy provides guidance to staff On Managing Behaviours that challenge in a holistic way which aims to increase quality of life and reduce the need for restrictive intervention. The Falkland Islands Positive Behaviour Policy should be read in conjunction with this policy.

Restraint can include;

- Physical restraint: any direct physical contact where the intention of the person intervening is to prevent, restrict, or subdue movement of the body, or part of the body of another person.
- Prone restraint: (a type of physical restraint) holding a person chest down, whether the patient placed themselves in this position or not, is resistive or not and whether the person is face down or has their face to the side. It includes being placed on a mattress face down while in holds; administration of depot medication while in prone holds, and being placed prone onto any surface.

- Chemical restraint: the use of medication which is prescribed and administered for the purpose of controlling or subduing disturbed/violent behaviour, and where it is not prescribed for the treatment of a formally identified existing physical or mental illness.
- Mechanical restraint: the use of a device (e.g. belt or cuff) to prevent, restrict or subdue movement of a person's body, or part of the body, for the primary purpose of behavioural control.

Restrictive Practice can include a range of interventions that has the effect of restricting the rights or freedom. It is used for a number of reasons including to manage behaviours that challenge, to keep people safe and also to help people live a more positive life. Examples of restrictive practice include;

Environmental

- 24-hour support/observations/1:1 supervision
- Key pad access
- Access to space
- Locked doors/drawers/medication cabinets
- Segregation
- Assistive technology
- Non inclusive environments (access)

Mechanical

where the use of mechanical restriction is implemented for the purpose of controlling or subduing disturbed/violent behaviour

- Bed rails
- Lap straps
- Arm cuffs/splints to reduce self-injury
- Grab belts
- Harnesses in vehicles
- Use of mittens

Chemical restraint; the use of medication

where the use of medication which is prescribed and administered for the purpose of controlling or subduing disturbed/violent behaviour, and where it is not prescribed for the treatment of a formally identified existing physical or mental illness.

- Regular sedative medication
- As required sedative medication
- Rapid tranquilisation
- Covert medication (medication given without the persons' knowledge)

(Any form of pharmaceutical restriction must be agreed on a multi-disciplinary basis involving the recommendation of the medical professional responsible for prescribing medication.)

Physical

- Proactive working practices i.e. manual guidance/assistance and ensuring staff are prepared for potential situations.
- Keeping safe techniques i.e. breakaway techniques.
- Person specific interventions i.e. hair pull release.
- Restrictive person specific i.e. anything that would restrict the individual's freedom of movement, such as 2 person escorts.

7 DEPRIVATION OF LIBERTY REFERRAL PROCEDURE

The Mental Capacity Policy allows for the use of some restraint and restrictive practice for adults who lack capacity – but only if they are in a person's best interest and necessary and proportionate; it **does not** provide authority for deprivation of liberty to be used.

If it is established that the use of restraint and restrictive practice will deprive a person of their liberty then additional safeguards are needed in order to ensure the deprivation of liberty is carried out in a lawful way.

In order to ensure the rights of adults without capacity who are deprived of their liberty are upheld the following process has been adopted by the Falkland Islands Government.

7.1 Step One - Establishing deprivation of liberty

In establishing whether someone is deprived of their liberty there are two key questions to ask – 'the acid test':

(1) Is the person subject to continuous supervision and control?

and

(2) Is the person free to leave?

If someone is subject to a high level of supervision, and is not free to leave the premises permanently, then it is almost certain that they are being deprived of their liberty. Each case must be considered on

its own merits, but in addition to the two 'acid test' questions, if the following features are present, you must make a deprivation of liberty referral;

- The frequency and intensity of monitoring level meets the 'acid test'
- Person not being free to leave
- Regular use of physical restraint to control behaviour
- Frequent or prolonged use of sedation/ medication to control behaviour
- The person is confined to a particular part of the establishment in which they are being cared for
- The Falkland Islands Government taking decisions on a person's behalf regarding treatments
- The Falkland Islands Government determine contact with visitors, above generic visiting restriction in place within the care and support setting
- Duration of the restrictions
- The person concerned objects verbally or physically to the restriction and/or restraint
- The person is already subject to a Supreme Court deprivation of liberty authorisation which is about to expire
- The level of care and support provided taken as a whole

A determination will need to be made if the restrictions implemented reach the degree and intensity which constitute a deprivation of liberty. If it remains unclear whether a person is being deprived of their liberty, then action should be taken as if a deprivation of liberty is occuring.

7.2 Step Two - Making a Deprivation of Liberty Referral.

If a person is being or suspected of being deprived of their liberty a deprivation of liberty referral must be made. The person; must;

- Be at least 18 years of age
- lack mental capacity to consent to care and treatment plan including the proposed deprivation of liberty
- not be detained under the Mental Health Ordinance 2010 If you have identified the person is deprived of their liberty;

and

You believe they lack capacity to consent to their care and support arrangements.

YOU NEED TO:

1) Complete the Falkland Islands Mental Capacity Assessment documentation IN FULL, in relation to the decision to consent to care and support arrangements including proposed deprivation of liberty (see Falkland Islands Government Mental Capacity Policy, s5.)

2) Inform family/ representative or advocate that you will be following the deprivation of liberty process.

3) Consider if there are less restrictive measures

4) If the patient lacks mental capacity to consent to the care and support arrangements including proposed deprivation of liberty then you will need to complete the Best Interest Decision Form (see Falkland Islands Government Mental Capacity Policy, s6.).

5) The completed deprivation of liberty referral form (Appendix five), mental capacity assessment and best interest decision form should then be submitted to Social Services via referrals@social@kemh.gov.fk

6) The Social Services Department will screen and action the referral in accordance with the Social Services Deprivation of Liberty process

The deprivation of liberty referral form must be completed in full.

A copy of the deprivation of liberty referral should be saved to the person's care and support record.

You should inform family members that a deprivation of liberty referral has been submitted to Social Services in line with the Deprivation of Liberty, Restraint and Use of Restrictive Practice policy unless it is impractical or impossible to do so, or undesirable in terms of the person's best interest. Reasons for not informing family members should always be recorded.

A deprivation of liberty referral must be made where it appears likely that, at some time during the next 28 days, someone will be accommodated in hospital, residential care or other care setting in circumstances that amount to a deprivation of liberty within the meaning of this policy.

Whenever possible, a referral should be submitted in advance. Where this is not possible, and you believe it is necessary to deprive someone of their liberty in their best interest a deprivation of liberty referral must be submitted within 24 hours of the commencement of the deprivation of liberty.

7.3 When should an Advocate be requested?

The Assessment and Safeguarding of Adults Ordinance 2020 states that where an individual lacks mental capacity the government must be satisfied that there is a person -

(a) who would be an appropriate person to represent and support the individual for the purpose of facilitating the individual's involvement;

and

(b) who is not engaged in providing care or treatment for the individual in a professional capacity or for remuneration.

In cases where it is identified there is not an appropriate person to support the involvement of the individual the Government must;

'arrange for a person who is independent of the Government (an "independent advocate") to be available to represent and support the individual for the purpose of facilitating the individual's involvement.'

When making a deprivation of liberty referral it is important to identify and document within the referral a family member or alternative representative who can support the involvement of the individual. In the absence of an appropriate family member or alternative representative this should be highlighted on the referral form. It is then Social Services responsibility to identify an independent advocate to support the involvement of the individual within the deprivation of liberty process.

There may be cases when family members or alternative representatives have contradictory views and where these cannot be immediately resolved this should be highlighted on the referral form.

7.4 Receipt of a deprivation of liberty referral

Social Services should aim to review all new referrals for deprivation of liberty within 2 working days, and undertake initial checks to ensure that the referral is likely to meet the referral criteria, for example by ascertaining:

- whether the service user lacks mental capacity to consent to care and treatment; whether the service user is subject to 24-hour supervision and control by staff;
- whether staff would need to take steps to stop the service user from leaving the care home or hospital if they attempted to.

Where vital information has not been provided in order to make a decision regarding the referral for deprivation of liberty, Social Services will request that the department making the deprivation of liberty referral provides any information required within the initial two working days.

When a referral for deprivation of liberty is received, Social Services must, as soon as practical and possible:

- consider whether the referral is appropriate and should be progressed
- seek any further information that is required from the department making the referral to help with the decision
- Appoint an advocate where it has been confirmed the person does not have a family member or appropriate representative to support their involvement in the deprivation of liberty process.

Social Services must decide within 10 working days whether the person is being deprived of their liberty. If it is determined that the individual is being deprived of their liberty it is the responsibility of Social Services to seek legal advice from the Attorney Generals Chambers.

Social Services must keep a record of the deprivation of liberty referral.

7.5 Documentation

In order to process the deprivation of liberty referral process it will be necessary for Social Services to have access to and take copies of information relevant to the individual.

Social Services may at all reasonable times examine and take copies of;

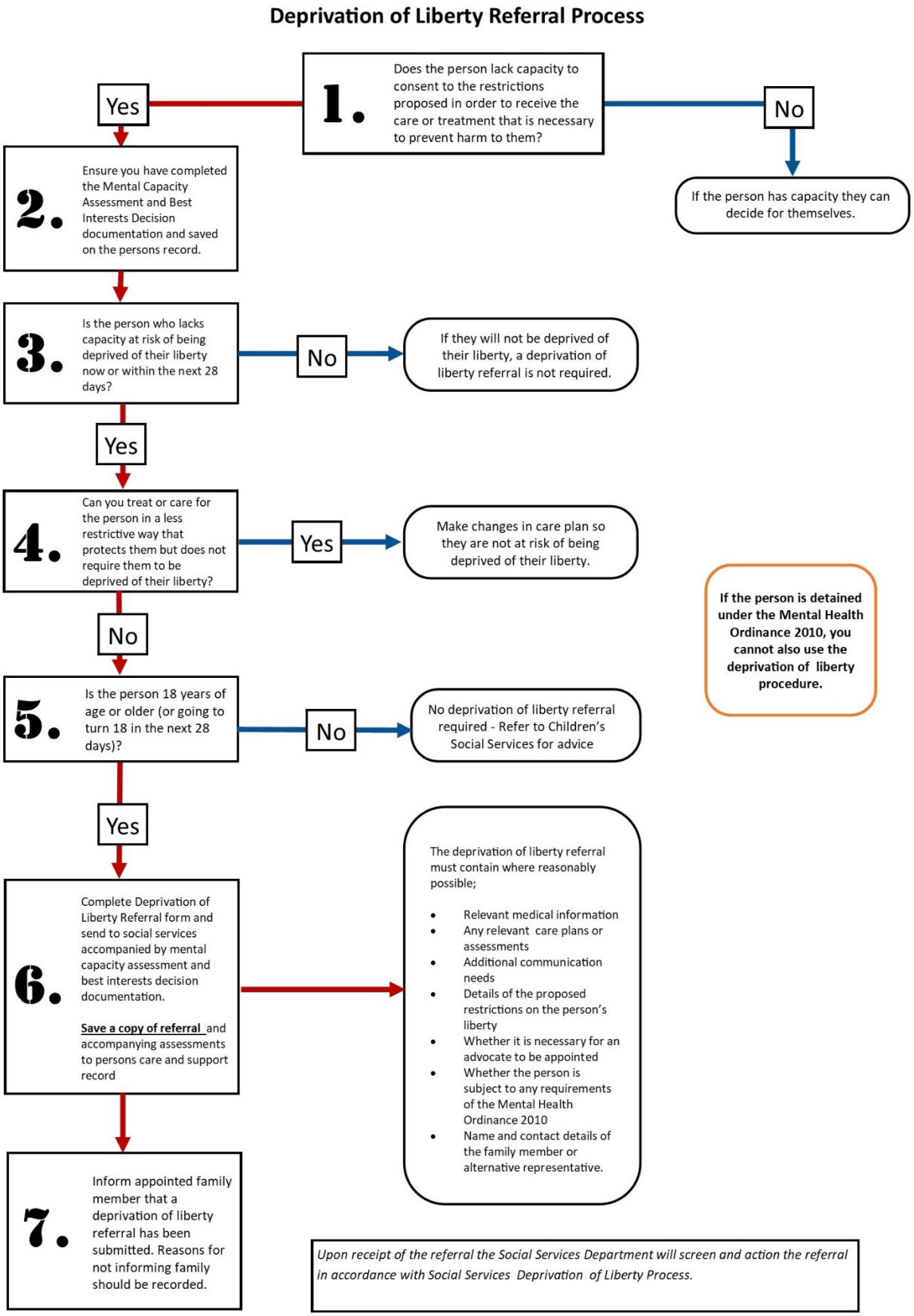
- health information relating to the deprivation of liberty
- any care and support record relating to the individual
- relevant risk assessments
- any record considered by Social Services as relevant to the deprivation of liberty

If it is the advice of the Attorney General's Chamber that the deprivation of liberty should be authorised by the Supreme Court, all documentation will be shared with the court for consideration. It is therefore essential that all recording is of a high standard and clearly outlines the current care and support arrangements, why the proposed deprivation of liberty is considered to be in the person's best interest and the least restrictive option available.

8 Safeguarding of Adults

It is the responsibility of all FIG employees to understand when a deprivation of liberty is occuring or is likely to occur and to observe the steps contained within this policy. In cases of deprivation of liberty where the principles of this policy are not fulfilled a safeguarding adult referral must be considered in accordance with the Safeguarding of Adults in the Falkland Islands policy and Safeguarding of Adults in the Falkland Islands – Guidance for Professionals.

Appendix One – Deprivation of Liberty Referral Process



Appendix Two – Deprivation of Liberty versus Restraint and Restrictive Practice

Deprivation of Liberty, Restraint and Restrictive Practice

When does restraint and restrictive practice become a Deprivation of Liberty?

Restraint and Restrictive Practice		Deprivation of Liberty is or could be indicated
Staff exercise some control over person, such as determining daily routines	SUPERVISION AND CONTROL	Staff have extensive control over the care and movement of a person. The person is confined to a particular area of the setting in which they are being cared for
Doors are locked to prevent person from leaving. If the person attempts to leave they will be prevented from doing so.	FREE TO LEAVE	Doors are locked and the person is never allowed out without an escort
The person is restrained under the terms of the Falkland Islands Mental Health Capacity Policy	USE OF RESTRAINT	Regular use of restraint, including prolonged use of sedation / medication to control behaviour
Contact with others is limited, such as visiting hours	VISITORS	Contact with others or the world outside is severely limited because of additional rules. Staff take decisions on a person's behalf regarding contact with visitors
The person may be object to a short term or one-off restriction such as use of safety mittens to prevent removal of invasive devices, lines or tubes	OBJECTION	The person makes frequent requests to leave. The person concerned objects verbally or physically to the restriction and / or restraint
Family / carers request discharge but agree a compromise, for example, discharge but attendance at a day centre	DISCHARGE	The person would not be allowed to live somewhere else. Family / carers request discharge and this is refused (no negotiation)

When deciding if someone is deprived of their liberty, you must consider the **DEGREE** and **INTENSITY** of the above restrictions.

1. Is the person subject to continuous supervision and control?

AND

2. Is the person free to leave?

If in doubt, always submit a deprivation of liberty referral.

Safeguarding Adults

Social Services Department

Appendix Three – Mental Capacity Assessment Form

Mental Capacity Assessment

The Mental Capacity Act 2005 states that **anyone** can assess another person's mental capacity especially in relation to day-to-day decisions and simple decisions. The Falkland Islands does not currently have specific legislation in regard to mental capacity therefore this policy is based on good practice recognised within the Mental Capacity Act 2005 (MCA). Assessors must abide by the following **five statutory principles** which are as follows:

1. A person must be **assumed** to have capacity unless it is established that he/she lacks capacity (by undertaking capacity assessment).

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

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

4. 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 his/her **best interest**.

5. Before the act is done, or 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.

Person's Details	
Name	
Address	
Date of Birth	
Date of Assessment	

	Yes	No
Do you need anyone else to provide information or give their opinion?		
Do you need to involve anyone to help you to communicate with the person?		

Please give the name and status of anyone who assisted with this assessment (Please include Representative details if one is involved)		
Name	Status	Contact Details

Decision Requiring Assessment of Mental Capacity (provide details)

NB: Before deciding that someone lacks capacity to make a particular decision, it is important to take all practical and appropriate steps to enable them to make that decision themselves.

What is the Decision?

STAGE 1 – Determining an impairment of disturbance to the mind or brain

NB - If a person does not have an impairment or disturbance of the mind or brain, they will not lack capacity under the Mental Capacity in the Falkland Islands Policy				
Does the individual have an impairment or a disturbance in the functioning of their mind or brain?	Yes		No	
What are the individuals presenting condition?				
Unconsciousness				
Autism Spectrum Disorder				
Mental Health Issues				
Other cognitive impairment e.g., Stroke				
Dementia				
Learning difficulties / disabilities				
Acquired brain injury				
Other (please specify)				
If you have answered **Yes** to Stage 1, **PROCEED TO STAGE 2**				
If you have answered **NO** to Stage 1, there is no such impairment or disturbance and thus **THE PERSON DOES NOT LACK CAPACITY** within the meaning of the Mental Capacity in the Falkland Islands Policy Sign/date form, record the outcome within the person's case records **DO NOT PROCEED ANY FURTHER**				

Having determined an impairment or disturbance in the functioning of the person's mind or brain? (Stage 1), you now need to complete your assessment and form your opinion as to whether the impairment or disturbance means that the person is unable to make the decision at the time the decision needs to be made?

Every effort must be made to provide the relevant information in a way that is most appropriate to help the person understand it. For example, easy read leaflets, large print, enabled the person to be

at ease, consider the location and timing; relevance of information communicated; the communication method used; and the involvement of others.

Describe the practical actions and steps you have taken to assist the person to make this specific decision.			
1. Is the person able to understand the information relevant to the decision to be made? *Do they understand the nature of the decision? The reason why the decision is needed? The likely effects of deciding one way or another, or making no decision at all?*			Evidence
	Yes		
	No		
2. Is the person able to retain the information for long enough to make an effective decision? *People who can only retain information for a short while must not be automatically assumed to lack the capacity to decide – it depends on what is necessary for the decision in question. Different methods may be needed to help someone retain information e.g. written information*	Yes		
	No		
3. Is the person able to use or weigh up the information as part of the decision-making process? *Sometimes people can understand information however they should be able to understand the advantages and disadvantages of the decision to be made.*	Yes		
	No		
	Yes		

4. Is the person able to communicate their decision? *All steps must be taken to aid communication.*	No		
Communication does not need to be verbal.			

Stage 2 – Assessment

NB: If a person cannot do one or more of these four things, they are unable to make the decision.

Outcome of Mental Capacity Assessment

On the balance of probabilities, there is a reasonable belief that:

The person **has** capacity to make this decision currently	
The person **does not have** capacity to make this decision currently	

If the person is considered, on the balance of probability, to HAVE the mental capacity to make this decision now. Sign/date this form and record the outcome within the person's case records. **Do not proceed to the best interest decision.**

If you have answered NO to any of the questions, proceed to the **Best Interest Decision**

Details of Assessor:

Assessor		Signature	
Designation		Date	
Date of next review		Time	

Appendix Four – Best Interest Decision Form

Best Interest Decision

4. To be completed when an assessment of capacity has identified that the person does **NOT** have the capacity to decide on a specific issue
5. ALL questions must be answered fully and evidence given to support the response.
6. Reference must be made to Mental Capacity in the Falkland Islands policy.

Best Interest Decision						
Describe the decision to be made						
1. Has the person made an Advance Decision that may be valid and applicable to some or all of the treatment?	Yes*		No		Not known	
*If Yes, is it valid and applicable to this decision?	Yes		No		If you are unsure, please seek advice	
2. Does the person have appointed an attorney under an Enduring Power of Attorney for) Property and finances decisions?	Yes		No		Not known	
Is there a court appointed Receiver?	Yes*		No		Not known	
* If yes you will need to consult with the EPA/Receiver as they may be the decision maker and take a copy for your records.						
3. Does the person have someone who is willing and able to support them? *If yes, please state	Yes*		No			
a) Name						
b) Relationship						
4. What practical steps have been made to ensure that the person is helped to participate as fully as possible in the decision making? For example, easy read leaflets, large print, enabled the person to be at ease, consider the location and timing; relevance of information communicated; the communication method used; and the involvement of others?)						
5. What is the person's past and present wishes in relation to this decision?						

6. What are the person's beliefs and values that would be likely to influence this decision?
7. What other factors would they consider?
8. What are the views of significant others? *(State who was consulted and their relationship to the person)*
Best Interest Decision Summary
1. What is the decision that has been made in the person's best interest (e.g. evidence using a balance sheet approach to consider and evidence the benefits and risks of each available option)?
2. Record the reasons why this decision is in the person's best interest
3. Document how this is the least restrictive option?

I have reached the "Best Interest Decision" in accordance with the principles and requirements of the Mental Capacity in the Falkland Islands Policy

Signature			
Print Name			
Date		Time	
Job title/Status			
Contact			
Date for review of Best Interest Decision			

Appendix Five – Deprivation of Liberty Referral Form

Social Services Department
Social Services Team, 20 Scoresby Close, Stanley, Falkland Islands
Telephone: (500) 27296
Email: admin.social@kemh.gov.fk

Deprivation of Liberty Referral Form

Subject of Referral

Full name of person being deprived of liberty		Date of Birth *(or estimated age if unknown)*	
Preferred Language		Language support required?	
Communication requirements/ Sensory Loss		Azeus/ EPR record	
Location of where person is being deprived of their liberty			
Usual address of the person, (if different to above)			
Relevant Medical History (*including diagnosis of mental disorder if known*)			

Is the person subject to any requirements of the Mental Health Ordinance 2010?	Yes *If the person is subject to requirements of the MHO 2010 then you should not submit a deprivation of liberty referral.*	No
Have you completed a Mental Capacity Assessment regarding 'consent to current care and support arrangements including proposed deprivation of liberty?'	Yes *Please ensure this is documented using the Mental Capacity Assessment contained within the Falkland Islands Mental Capacity Policy.*	No *Please complete and document mental capacity assessment using the Mental Capacity Assessment contained within the Falkland Islands Mental Capacity Policy.*
Has the person been assessed as LACKING capacity to 'consent to current care and support arrangements including proposed deprivation of liberty?	Yes *Please submit completed mental capacity assessment with this referral form.*	No *If the person has been assessed as HAVING capacity you should not submit a deprivation of liberty referral.*
Have you completed and documented a Best Interest Decision regarding 'consent to current care and support arrangements including proposed	Yes *Please ensure this is documented using the Best Interest Decision form contained within the Falkland Islands Mental Capacity Policy Please submit completed best interest's decision form with this referral form.*	No *Please complete and document best interest decision using the Best Interest Decision form contained within the Falkland Islands Mental Capacity Policy.*

deprivation of liberty?'		

Care and Support Arrangements

- *Please describe the care and / or treatment this person is receiving or will receive day-to-day and attach a relevant care plan.*
- *Please give as much detail as possible about the type of care the person needs, including personal care, mobility, medication, support with behavioural issues, types of choice the person has and any medical treatment they receive.*

Deprivation of Liberty

- *Explain why the person is or will not be free to leave and why they are under continuous or complete supervision and control.*
- *Describe the proposed restrictions or the restrictions you have put in place which are necessary to ensure the person receives care and treatment. (It will be helpful if you can describe why less restrictive options are not possible including risks of harm to the person.)*
- *Indicate the frequency of the restrictions you have put in place.*

Other relevant information including adult safeguarding issues

Advocacy - ***Please tick one box***	
Apart from professionals and other people who are paid to provide care or treatment, this person has no one whom it is appropriate to consult about what is in their best interest.	
There is someone whom it is appropriate to consult about what is in the person's best interest who is neither a professional nor is being paid to provide care or treatment.	

Information about family members, representatives or other people to consult		
Family member of alternative representative	Name	
	Contact details	
Anyone named by the person as someone to be consulted about their welfare	Name	
	Contact details	
Anyone engaged in caring for the person or interested in their welfare	Name	
	Contact details	

Referrer details			
Name			
Job title			
Department			
Telephone			
Email			
Ward (if appropriate)			
Please now sign and date this form			
Signature		Print Name	
Date		Time	
I have informed any family members or representatives of the deprivation of liberty referral (*please sign to confirm)*			
