3. ADULT SAFEGUARDING PRACTICE

This section sets out the essential work that must be considered throughout adult safeguarding. In every case there must be evidence of due diligence and attention to mental capacity and consent.

3.1 Mental Capacity and Consent

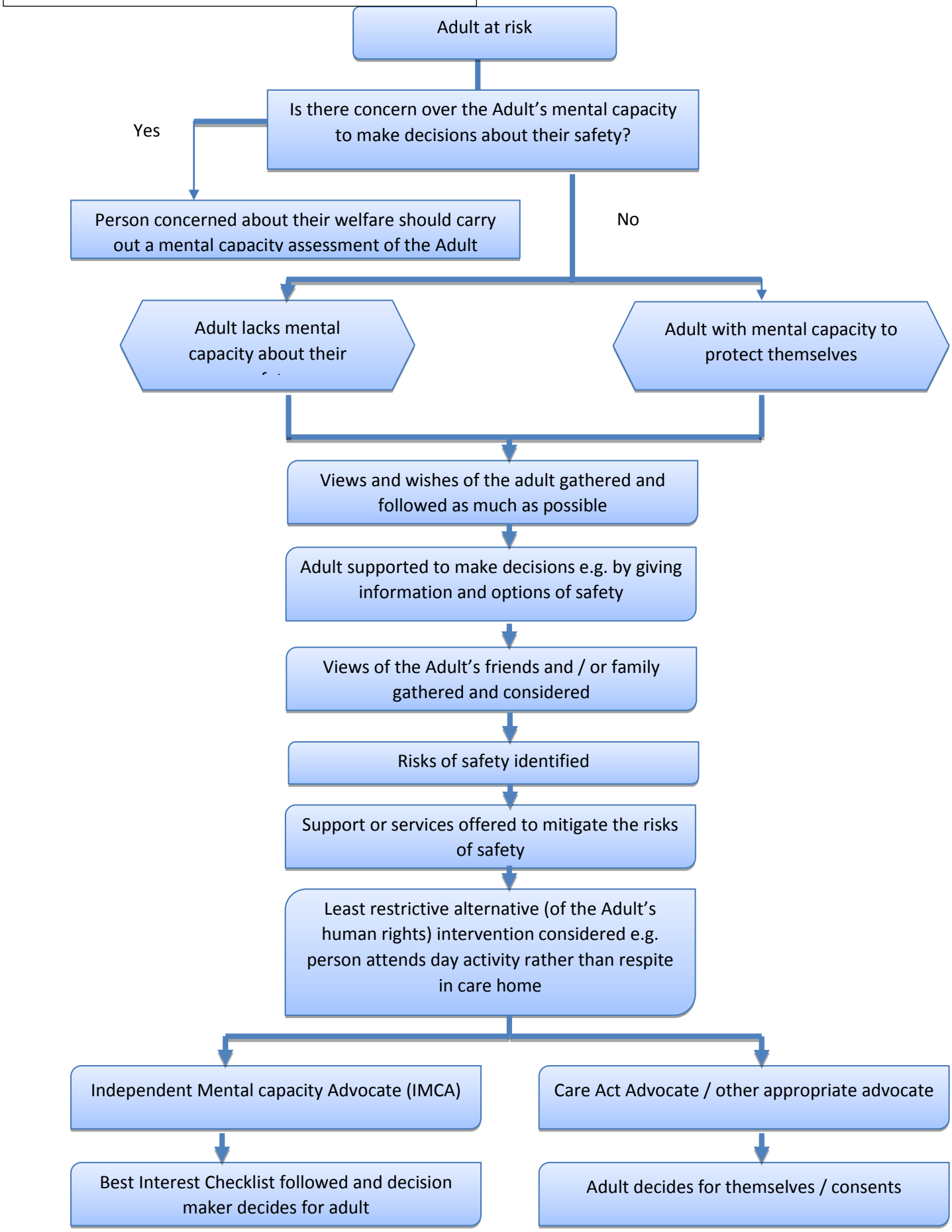
The Mental Capacity Act 2005[vii] provides a statutory framework to empower and protect people who may lack capacity to make decisions for themselves; and establishes a framework for making decisions on their behalf. This applies whether the decisions are life-changing events or everyday matters. All decisions taken in the adult safeguarding process must comply with the Act.

The Mental Capacity Act outlines five statutory principles[lxii] that underpin the work with adults who may lack mental capacity:

1. A person must be assumed to have capacity unless it is established that he lacks capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he 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 best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Learning from Safeguarding Adults Reviews continues to show that staff working with adults who lack mental capacity are not fully complying with principle 5 above.

Figure 1: Mental Capacity Assessment



The majority of adults that require additional safeguards are people who are likely to lack mental capacity to make decisions about their care and support needs.

Mental Capacity refers to the ability to make a decision about a particular matter at the time the decision is needed. It is always important to establish the mental capacity of an adult who is at risk of abuse or neglect, should there be concerns over their ability to give informed consent to:

- Planned interventions and decisions about their safety;
- Their safeguarding plan and how risks are to be managed to prevent future harm.

3.1.1 Mental Capacity Assessment

The Act says that:

'…*a person lacks capacity in relation to a matter if at the material time he/she is unable to make a decision for him/herself in relation to the matter because of an impairment of, or disturbance in the functioning of the mind or brain. Further, a person is not able to make a decision if they are unable to:*

- *Understand the information relevant to the decision; or*
- *Retain that information long enough for them to make the decision; or*
- *Use or weigh that information as part of the process of making the decision; or*
- *Communicate their decision (whether by talking, using sign language or by any other means such as muscle movements, blinking an eye or squeezing a hand)'.*

Mental capacity is time and decision-specific. This means that an adult may be able to make some decisions at one point but not at other points in time. Their ability to make a decision may also fluctuate over time. If an adult is subject to coercion or undue influence by another person this may impair their judgement and could impact on their ability to make decisions about their safety. Thus, an adult could be put under pressure, for example in domestic abuse situations, that they lack the mental capacity to make the decisions about their safety. Staff must satisfy themselves that the adult has the mental ability to make the decision themselves; if not, it is best to err on the side of caution, identify the risks and consider support or services that will mitigate the risk. Preventing the person from isolation can be a protective factor. Involving an advocate could assist in such circumstances. Advocacy support can be invaluable and may be provided by an IMCA or other appropriate advocate. See also section 3.2.1 and Appendix One Advocacy

3.1.2 Consent in relation to safeguarding

Consent in relation to safeguarding

The Care Act 2014[i] statutory guidance advises that the first priority in safeguarding should always be to ensure the safety and well-being of the adult.

Making Safeguarding Personal[vi] is a person centred approach which means that adults are encouraged to make their own decisions and are provided with support and information to empower them to do so. This approach recognises that adults have a general right to independence, choice and self-determination including

control over information about themselves. Staff should strive to deliver effective safeguarding consistently with both of the above principles. They should ensure that the adult has accessible information so that the adult can make informed choices about safeguarding: what it means, risks and benefits and possible consequences. Staff will need to clearly define the various options to help support them to make a decision about their safety.

Adults may not give their consent to the sharing of safeguarding information for a number of reasons. For example, they may be unduly influenced, coerced or intimidated by another person, they may be frightened of reprisals, they may fear losing control, they may not trust social services or other partners or they may fear that their relationship with the abuser will be damaged. Reassurance and appropriate support may help to change their view on whether it is best to share information. Staff should consider the following and:

- Explore the reasons for the adult's objections – what are they worried about?
- Explain the concern and why you think it is important to share the information
- Tell the adult with whom you may be sharing the information with and why
- Explain the benefits, to them or others, of sharing information – could they access better help and support?
- Discuss the consequences of not sharing the information – could someone come to harm?
- Reassure them that the information will not be shared with anyone who does not need to know
- Reassure them that they are not alone and that support is available to them.

If, after this, the adult refuses intervention to support them with a safeguarding concern, or requests that information about them is not shared with other safeguarding partners, in general, their wishes should be respected. However, there are a number of circumstances where staff can reasonably override such a decision, including:

- The adult lacks the mental capacity to make that decision – this must be properly explored and recorded in line with the Mental Capacity Act[vii]
- Emergency or life-threatening situations may warrant the sharing of relevant information with the emergency services without consent
- Other people are, or may be, at risk, including children
- Sharing the information could prevent a serious crime
- A serious crime has been committed
- The risk is unreasonably high and meets the criteria for a multi-agency risk assessment conference referral[lxiii]
- Staff are implicated
- There is a court order or other legal authority for taking action without consent.

In such circumstances, it is important to keep a careful record of the decision-making process. Staff should seek advice from managers in line with their organisations' policy before overriding the adult's decision, except in emergency situations. Managers should make decisions based on whether there is an overriding reason which makes it necessary to take action without consent and whether doing so is proportionate because there is no less intrusive way of ensuring safety. Legal advice should be sought where appropriate. If the decision is to take action without the adult's consent, then unless it is unsafe to do so, the adult should be informed that this is being done and of the reasons why.

If none of the above apply and the decision is not to share safeguarding information with other safeguarding partners, or not to intervene to safeguard the adult:

- Support the adult to weigh up the risks and benefits of different options
- Ensure they are aware of the level of risk and possible outcomes
- Offer to arrange for them to have an advocate or peer supporter
- Offer support for them to build confidence and self-esteem if necessary
- Agree on and record the level of risk the adult is taking
- Record the reasons for not intervening or sharing information
- Regularly review the situation
- Try to build trust to enable the adult to better protect themselves.

It is important that the risk of sharing information is also considered. In some cases, such as domestic violence or hate crime, it is possible that sharing information could increase the risk to the adult. Safeguarding partners need to work jointly to provide advice, support and protection to the adult in order to minimise the possibility of worsening the relationship or triggering retribution from the abuser.

3.1.3 Mental Health Act 1983[lxiv] (amended 2007[lxv]) and Mental Capacity Act 2005[vii]

There are important differences between being treated under the Mental Health Act (MHA) and the Mental Capacity Act[vii] (MCA). If adults are treated under the MCA their lack of mental capacity to make decisions must be established. Adults, who have mental capacity and refuse treatment for mental illness, should be treated under the MHA if they are subject to the Mental Health Act 1983[lxiv].

- The Mental Health Act[lxv] is used to ensure that people who need treatment for serious mental disorder receive this treatment, even against their wishes, if there are sufficient risks to their own health or safety or risks to the safety of other people.
- The MCA Code of Practice[lxvi] makes it clear that all professionals should seek to use the MCA to make decisions if that is possible rather than using the MHA. (Code of Practice chap 13 introduction.)

CASE STUDY ON MENTAL CAPACITY AND ADULT SAFEGUARDING AND INTERFACE WITH DEPRIVATION OF LIBERTY SAFEGUARDS

Mrs Smith is 78 years of age and lives with her son in her owner occupied house with three cats. Mrs Smith is not very mobile as she has oedema in her legs and has some open wounds that are weeping fluid and she is diabetic. She has twice daily support from a care agency. She relies on her son to do her shopping and prepare a daily main meal. The son does not work and is suspected to have an alcohol addiction. Lately Mrs Smith has not been eating well, and is worried about her finances, as her son always asks her for money, which he lends to other friends. She has confided her situation to her neighbour. Mrs Smith has repeatedly says she feels very unwell and is worried that her son has borrowed tens of thousands of pounds from her and that he has no plans to pay this back. She says it is so bad she cannot afford any food or heating in the house. She appears confused about letters from the council stating that council tax has not been paid for many months. Mrs Smith's neighbour is so concerned she takes her to see her GP, who confirms that she has lost a lot of weight. The GP raises a safeguarding concern to the Local Authority about possible financial abuse and makes an initial diagnosis of memory impairment as a result of possible dementia. The GP refers to a psychiatrist who makes a home visit and carries out a mental capacity assessment with regards to whether Mrs Smith is able to manage her finances. The psychiatrist shares the information with the GP and Local Authority.

Mrs Smith is visited by a social worker who carries out a safeguarding enquiry whilst the son is out. The social worker meets with Mrs Smith to see whether she understands the concerns and to gather her views and establish the outcome that she wants. As an immediate safeguard she is given the option to stay at home or accept respite in a care home. She decides to go to a care home as she has not eaten for days and feels pressured by her son to always give him money. The social worker reports to the police the possibility of a crime. The police proceed to investigate and also consider action under Section 44 of the Mental Capacity Act[lxvii] which stipulates that someone can be prosecuted if found to wilfully abuse, or neglect an adult who lacks mental capacity.

At the care home Mrs Smith continues to be visited by her son, who asks her for money and searches her purse for small change. He brings letters with him which his friends have written to Mrs Smith, asking her to give the son money for their needs. Care staff tell the son not to put any pressure on his mother and notify the home manager and the Local Authority care management team. As Mrs Smith has memory problems and is deemed not to have mental capacity, her neighbour is consulted and it is agreed that she can take on the role of advocate.

In response to the safeguarding enquiry, Mr Smith says that he can take care of his mother and that she must come home. Staff prevent Mrs Smith from leaving and explain to the son that Mrs Smith would like to remain and that her care and support is best met in the care home at this point in time.

Mr Smith has also asked his mother to sign cheques, which staff members advise her not to sign as she appears confused about financial matters. He often arrives intoxicated and has put his mother into a broken wheelchair making it unsafe for her, staff have observed she is distressed by his behaviour.

A safeguarding planning meeting was held and a risk management plan formulated based on a best interest decision that the son will only be allowed supervised visits with his mother in the lounge area where staff can help prevent financial and psychological abuse. Mrs Smith's neighbour is at the meeting to advocate for her and to ensure that Mrs

Smith's wishes are considered.

The Care Home made an Urgent Deprivation of Liberty Safeguard (DoLS) application as Mrs Smith is deemed to lack the mental capacity to decide about her stay. She is under continuous supervision of staff in the care home and she is not able to leave. Her stay is considered to be in her best interests so she can have the necessary care which includes regular dressings and medical attention to her legs and to ensure she has sufficient nutritious meals. Her son is informed of the arrangement and is informed that the Local Authority has lodged an application to the Court of Protection with regards to the DoLS and the safeguarding plan. Furthermore, as Mrs Smith lacks capacity to manage her own financial affairs the Local Authority included a request to the Court for a decision for a deputyship.

The application to the Court of Protection was made to consider:

Whether the DoLS is lawful and should continue;

Whether supervised visits by the son are lawful;

Who is best suited to manage Mrs Smith's finances?

This case study also identifies the balance required to work with people who are the source of abuse and neglect to be compliant with the Mental Capacity Act 2005[vii] and safeguard the adult and ensure that their wishes are paramount.

3.2 Advocacy & Support

3.2.1 Advocacy

The Care Act 2014[i] requires that a Local Authority must arrange, where appropriate, for an independent advocate to represent and support an adult who is the subject of a safeguarding enquiry or SAR where the adult has 'substantial difficulty' in being involved in the process and where there is no other appropriate individual to help them. (Section 68[lxviii]).

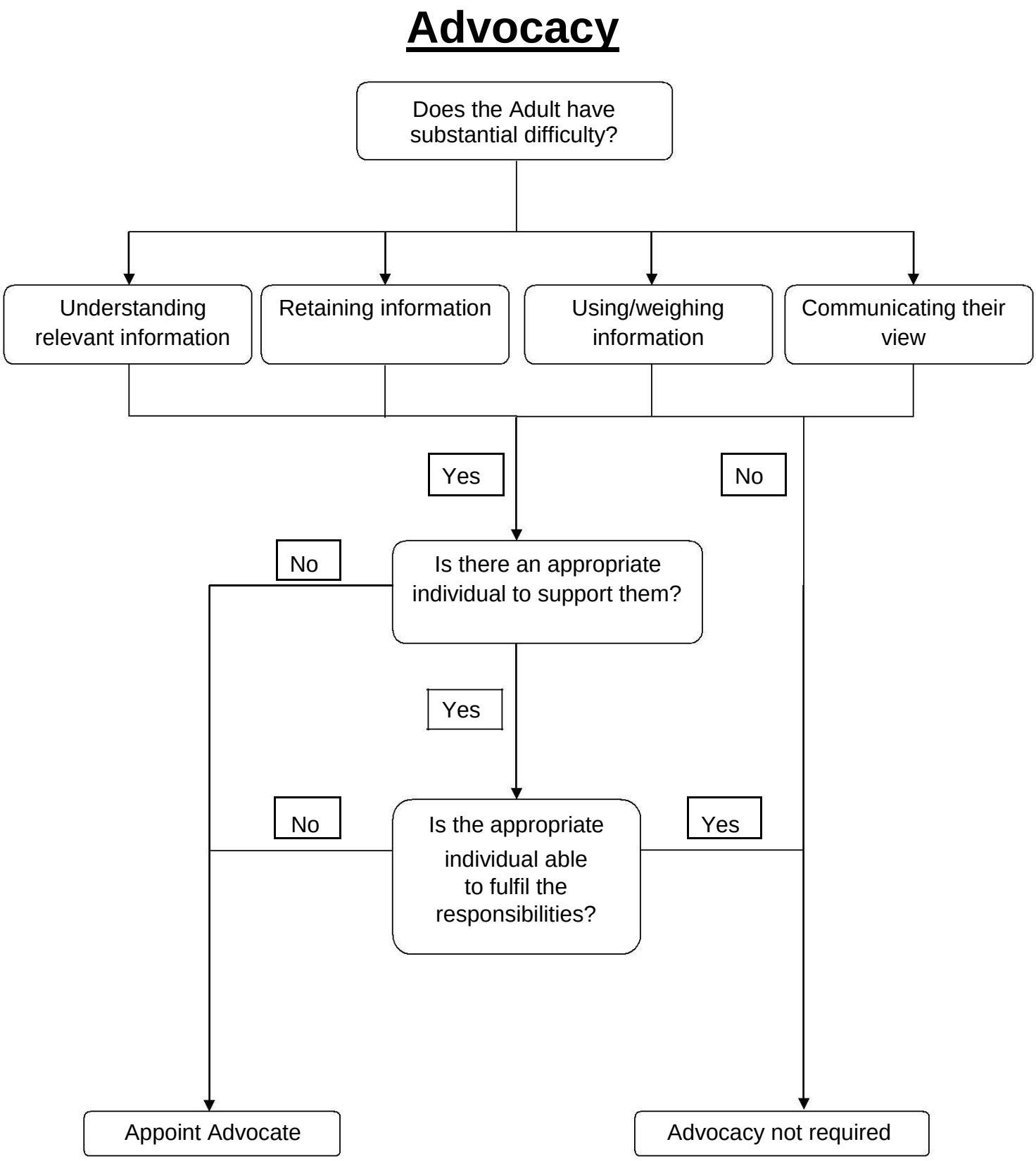
There are distinct differences between an Independent Mental Capacity Advocate (IMCA) introduced under the Mental Capacity Act 2005[vii], and an Independent Advocate introduced under the Care Act 2014. Independent advocates cannot undertake advocacy services under the Mental Capacity Act 2005, however where there is an appointed IMCA they may also take on the role of Independent Advocate under the Care Act 2014.

The Figure 1 flowchart above, illustrates the interface between mental capacity and advocacy.

Briefing Note: Independent Advocacy under the Care Act 2014[lxix] - Care and Support Providers.

See also Appendix One Advocacy.

Figure 2: When to appoint an independent advocate



It should be remembered that where the adult does not want support from family or friends that their wishes should be respected and an independent advocate provided. Further advocacy resources are available below:

- An overview of advocacy requirements under the Care Act 2014[lxx].
- Guidance for care and support providers[lxix]
- Helpful workbook to assist compliance with the Care Act 2014 and acts as practice guidance for staff[lxxi]

3.2.2 Support to adults

A requirement under the Equality Act 2010[xxvi] is for provision and adjustments to enable disabled people equal access to information and advice. Ensuring equality may reduce or remove substantial difficulty. Access to other services, for example translators, should always be considered to ensure that the adults are afforded every opportunity to participate and be involved.

3.2.3 Support for vulnerable witnesses in the criminal justice process

Research has found that sometimes evidence from victims and witnesses with learning disabilities is discounted. This may also be true of others such as people with dementia. It is crucial that reasonable adjustments are made and appropriate support given, so people can get equal access to justice:

- Guidance should include reference to support relating to criminal justice matters which is available locally from such organisations as Victim Support and court preparation schemes;
- Some witnesses will need protection; and the police may be able to get victim support in place.

Special Measures were introduced through legislation in the Youth Justice and Criminal Evidence Act 1999[lxxii] (YJCEA) and include a range of measures to support witnesses to give their best evidence and to help reduce some of the anxiety when attending court. Measures in place include the use of screens around the witness box, the use of live-link or recorded evidence-in-chief and the use of an intermediary to help witnesses understand the questions they are being asked and to give their answers accurately.

Vulnerable Adult Witnesses (Section16 YJCEA[lxxiii]) have a:

- Mental disorder
- Learning disability, or
- Physical disability

These witnesses are only eligible for special measures if the quality of evidence that is given by them is likely to be diminished by reason of the disorder or disability.

Intimidated Witnesses (Section 17 YJCEA[lxxiv]): Intimidated witnesses are defined by Section 17 of the Act as those whose quality of evidence is likely to be diminished by reason of fear or distress. In determining whether a witness falls into this category the court takes account of:

- The nature and alleged circumstances of the offence;
- The age of the witness;
- The social and cultural background and ethnic origins of the witness;
- The domestic and employment circumstances of the witness;
- Any religious beliefs or political opinions of the witness;
- Any behaviour towards the witness by the accused or third party.

Also falling into this category are:

- Complainants in cases of sexual assault;
- Witnesses to specified gun and knife offences;
- Victims of and witnesses to domestic violence, racially motivated crime, crime motivated by reasons relating to religion, homophobic crime, gang related violence and repeat victimisation;
- Those who are older and frail;
- The families of homicide victims.

Registered Intermediaries (RIs) have been facilitating communication with vulnerable witnesses in the criminal justice system in England and Wales since 2004.

Special measure include practical and emotional support to victims and witnesses (either for the defence or for the prosecution) provided by the Witness Service. Support is available before, during and after a court case to enable adults and their family and friends to have information about court proceedings and could include arrangements to:

- Visit the court in advance of the trial;
- Consider the use of screens in court proceedings;
- The removal of wigs and gowns;
- The sharing of use of intermediaries and aids to communication.

If the person alleged to have caused harm is a young person or has a mental disorder, including a learning disability, and they are interviewed at the police station, they are entitled to the support of an 'appropriate adult' under the provisions of the Police and Criminal Evidence Act 1984 Code of Practice[lxxv].

There is an automatic referral to Victim Support services for all victims of crime whether they are deemed vulnerable or not.

3.3 Managing Risk

There is a range of risk assessment tools available such as use by the MPS of the Domestic Abuse risk matrix to identify and manage risk and the. It is important that tools are available locally to support staff to evidence professional judgement during their decision making. Issues around information sharing may be relevant in this context. See Section 1.1.4 for more details.

3.3.1 Involving the adult

Making Safeguarding Personal (MSP) stresses the importance of keeping the adult at the centre. Under MSP the adult is best placed to identify risks, provide details of its impact and whether or not they find the mitigation acceptable. Working with the adult to lead and manage the level of risk that they identify as acceptable creates a culture where:-

- Adults feel more in control;
- Adults are empowered and have ownership of the risk;
- There is improved effectiveness and resilience in dealing with a situation;
- There are better relationships with professionals;
- Good information sharing to manage risk, involving all the key stakeholders (see Information Sharing part one);
- Key elements of the person's quality of life and well-being can be safeguarded.

3.3.2 Identifying Risk

Not every situation or activity will entail a risk that needs to be assessed or managed. The risk may be minimal and no greater for the adult, than it would be for any other person.

- Risks can be real or potential;
- Risks can be positive or negative;
- Risks should take into account all aspects of an individual's wellbeing and personal circumstances.

Sources of risk might fall into one of the four categories below:

- Private and family life: The source of risk might be someone like an intimate partner or a family member;
- Community based risks: This includes issues like 'mate crime', anti-social behaviour, and gang-related issues;
- Risks associated with service provision: This might be concerns about poor care which could be neglect or organisational abuse, or where a person in a position of trust because of the job they do financially or sexually exploits

someone;

- Self-neglect: Where the source of risk is the person themselves.

3.3.3 Risk Assessment

Risk assessment involves collecting and sharing information through observation, communication and investigation. It is an on-going process that involves persistence and skill to assemble and manage relevant information in ways that are meaningful to all concerned. Risk assessment that includes the assessment of risks of abuse, neglect and exploitation of people should be integral in all assessment and planning processes, including assessments for self-directed support and the setting up of personal budget arrangements. Assessment of risk is dynamic and on-going and a flexible approach to changing circumstances is needed. The primary aim of a safeguarding adults risk assessment is to assess current risks that people face and potential risks that they and other adults may face. Specific to safeguarding, risk assessments should encompass:

- The views and wishes of the adult;
- The person's ability to protect themselves;
- Factors that contribute to the risk, for example, personal, environmental
- The risk of future harm from the same source;
- Identification of the person causing the harm and establishing if the person causing the harm is also someone who needs care and support;
- Deciding if domestic abuse is indicated and the need for a referral to a MARAC;
- Deciding if a community multi-agency risk assessment (high risk panel) is needed;
- Identify people causing harm who should be referred to MAPPA;
- It may increase risk where information is not shared.

3.3.4 Risk Management

The focus must be on the management of risks not just a description of risks. Employers need to take responsibility for the management of risk within their own organisation and share information responsibly where others may be at risk from the same source. The Local Authority may be ultimately accountable for the quality of Section 42 enquiries, but all organisations are responsible for supporting holistic risk management, with the adult and in partnership with other agencies.

It is the collective responsibility of all organisations to share relevant information, make decisions and plan intervention with the adult. A plan to manage the identified risk and put in place safeguarding measures includes:

- What immediate action must be taken to safeguard the adult and/others;

- Who else needs to contribute and support decisions and actions;
- What the adult sees as proportionate and acceptable;
- What options there are to address risks;
- When action needs to be taken and by whom;
- What the strengths, resilience and resources of the adult are;
- What needs to be put in place to meet the on-going support needs of the adult;
- What the contingency arrangements are;
- How will the plan be monitored?

Positive risk management needs to be underpinned by widely shared and updated contingency planning for any anticipated adverse eventualities. This includes warning signs that indicate risks are increasing and the point at which they become unacceptable and therefore trigger a review.

Effective risk management requires exploration with the adult using a person-centred approach, asking the right questions to build up a full picture. Not all risks will be immediately apparent; therefore risk assessments need to be regularly updated as part of the safeguarding process and possibly beyond.

3.3.5 Reviewing Risk

Individual need will determine how frequently risk assessments are reviewed and wherever possible there should be multi-agency input. These should always be in consultation with the adult at risk.

3.3.6 Risk disputes

Throughout these policies and procedures risk assessment and risk management is carried out in partnership with the adult, wider support network and others. The decision to involve others or not is in itself a decision which may give rise to risk, and the individual may need support to make this decision.

The professional views of risk may differ from the views of the adult. Perceived risks have implications for the safety and the independence of the individual, but they also have implications for the accountability of professionals. This highlights the importance of training and/or regular practice in making independent decisions by adults. Accessible knowledge through information and advice, assertiveness through the right kind of advocacy and support may be appropriate.

Professionals need to embrace and support positive risk taking by finding out why the person wishes to make a particular choice, what this will bring to their life, and how their life may be adversely affected if they are not supported in their choice. The promotion of choice and control, of more creative and positive risk-taking, implies greater responsibility on the part of the adult and greater emphasis on keeping them at the centre of decision making.

It may not be possible to reach agreement, but professionals need to evidence that all attempts to reach agreement were taken. Where there are concerns about people making unwise decisions, or there is high risk that requires wider collaboration; Multi-Agency Risk Panel (sometimes referred to as High Risk Panels or Risk Enablement Panels) is one model used to support safeguarding adults' processes.

3.4 Recording actions under adult safeguarding

A record of all actions and decisions must be made. Good record keeping is a vital component of professional practice. When abuse or neglect is raised managers need to look for past incidents, concerns, risks and patterns. We know that in many situations, abuse and neglect arise from a range of incidents over a period of time. In the case of providers registered with CQC, records of these should be available to service commissioners and the CQC so they can take the necessary action. At a minimum there should be an audit trail of:

- Date and circumstances of concerns and subsequent action;
- Decision making processes and rationales;
- Risk assessments and risk management plans;
- Consultations and correspondence with key people;
- Advocacy and support arrangements;
- Safeguarding plans;
- Outcomes;
- Feedback from the adult and their personal support network;
- Differences of professional opinion;
- Referrals to professional bodies.

Records may be disclosed in courts in criminal or civil actions. All organisations should audit safeguarding concerns and outcomes as part of their quality assurance (Local Authority should use existing codes within the Safeguarding Adult Collections categories). Supervisors should ensure that that recording is addressed in supervision and that staff are clear of their responsibilities. SABs should regularly review the quality of recording as part of its performance and quality data scrutiny.

Learning lessons from past mistakes and missed opportunities highlighted in Safeguarding Adult Reviews, Serious Case Reviews and other reports emphasise the need for quality recording especially when managing abuse, neglect and risk. This includes providing rationales for actions and decisions, whether or not they were taken, and if not the reasons for this.

Quality recording of adult safeguarding not only safeguards adults, but also protects workers by evidencing decision making based on the information available at the time. For more information see the University of the West of England advice on the

importance of keeping records[lxxvi]

3.5 Organisational learning

It is essential that all aspects of safeguarding practice is monitored and scrutinised on a regular basis. All staff have a responsibility to audit their work and a set of local outcome focused standards might support staff.

All agencies need to take responsibility for organisational learning and implement changes to their practice as a result of audits, complaints, SARs, and most importantly feedback from adults at risk about what works well and what needs to improve provide opportunities for learning from themes and patterns of practice that can add value to learning from good practice, and pinpointing necessary changes.

In addition to practice guidance highlighted throughout this document, staff may find the following information from SCIE helpful on adult safeguarding questions[lxxvii].