Pol Community Care Ltd
Office 2, Caradon Enterprise Centre, 1 Holman Road, Liskeard Business Park, Liskeard, Cornwall, PL14 3UT

Review Sheet

Last Reviewed 25 Sep '20	Last Amended 25 Sep '20	Next Planned Review in 12 months, or sooner as required.

Business impact	LOW IMPACT — Minimal action required circulate information amongst relevant parties.
Reason for this review	Scheduled review
Were changes made?	Yes
Summary:	Policy reviewed with no significant changes and references checked and updated.
Relevant legislation:	• The Care Act 2014 • The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 • Human Rights Act 1998 • Mental Capacity Act 2005 • Mental Capacity Act Code of Practice
Underpinning knowledge - What have we used to ensure that the policy is current:	• Author: The Office of the Public Guardian, (2007), *Mental Capacity Act Code of Practice*. [Online] Available from: https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice [Accessed: 25/9/2020] • Author: Social Care Institute for Excellence, (2015), *Mental Capacity Act (MCA) free resources: tools, videos, training materials*. [Online] Available from: https://www.scie.org.uk/mca-directory/ [Accessed: 25/9/2020] • Author: Office of the Public Guardian, (2009), *Health and social care workers: Mental Capacity Act decisions*. [Online] Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_da -Health-care-workers-MCA-decisions.pdf [Accessed: 25/9/2020]
Suggested action:	• Encourage sharing the policy through the use of the QCS App
Equality Impact Assessment:	QCS have undertaken an equality analysis during the review of this policy. This statement is a written record that demonstrates that we have shown due regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations with respect to the characteristics protected by equality law.

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1. Purpose

1.1 To meet the provisions of the Mental Capacity Act 2005 (occasionally referred to as 'The Act' in this policy):
1.2 To support Pol Community Care Ltd in meeting the following Key Lines of Enquiry:

Key Question	Key Lines of Enquiry
CARING	C2: How does the service support people to express their views and be actively involved in making decisions about their care, support and treatment as far as possible?
CARING	C3: How are people's privacy, dignity and independence respected and promoted?
EFFECTIVE	E7: Is consent to care and treatment always sought in line with legislation and guidance?

1.3 To meet the legal requirements of the regulated activities that Pol Community Care Ltd is registered to provide:

- The Care Act 2014
- The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014
- Human Rights Act 1998
- Mental Capacity Act 2005
- Mental Capacity Act Code of Practice

2. Scope

2.1 The following roles may be affected by this policy:

- Registered Manager
- Other management
- All workers delivering support or care

2.2 The following Service Users may be affected by this policy:

- All adult (16+) Service Users who might lack mental capacity as defined under the Act in England and Wales

2.3 The following stakeholders may be affected by this policy:

- The family and friends of Service Users who might lack mental capacity as defined under the Act in England and Wales

3. Objectives

3.1 To ensure adherence to the statutory framework of the MCA, including the five principles, to empower and protect vulnerable people who may lack capacity always to make their own decisions; to support them to plan ahead, if they wish, for a time when they may lose capacity.
3.2 To ensure that those working with an adult who lacks capacity will make specific decisions that are in the person's best interests as explained in the MCA and its code of practice, and the least restrictive of their rights that can be identified as meeting their needs.
3.3 To build confidence among staff regarding how and when to assess someone's mental capacity, and how to make best interests decisions when necessary, whilst also ensuring that staff are aware of their responsibilities and are legally protected through following the principles of the MCA.

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4. Policy

4.1 To ensure staff at Pol Community Care Ltd know, and work within the Act's underpinning principles:

- The presumption of capacity – every adult has the right to make his or her own decisions and must be assumed to have the capacity to do so unless it is proved otherwise
- Individuals must be supported to make their own decisions – people must be given all appropriate help before anyone concludes that they cannot make their own decisions
- Individuals must be able to make what might be seen as eccentric or unwise decisions, without this being used as the sole reason to say they lack capacity
- Best interests – anything done for, or on behalf of people who lack capacity must be in their best interests
- Least restrictive option - before any act is done or a decision is made, staff must consider if they have found the option that, while meeting the need, is the least restrictive possible of the person's basic rights and freedoms

4.2 To ensure that staff at Pol Community Care Ltd understand the importance of helping people to make their own decisions:

- Staff know how to present the right information in the right way, including using easy-read or pictures where suitable, and being clear about all the available options
- Staff actively look for the best ways to communicate with an individual, by checking that their vision and hearing are as good as they can be, or querying if an interpreter might be needed
- Staff put the Service User at ease, whether by choosing the right time of day to explain about a decision to the person, or asking whether they would like a relative or friend present
- Staff allow time for the Service User to ponder on the decision, or go away and discuss it with trusted relatives or friends

4.3 When a person lacks the mental capacity to make a particular decision, everything that is done for, or on behalf of that person is in the person’s best interests and restricts their rights as little as possible. In working out what is in someone’s best interests, staff apply the mandatory checklist of factors laid out in the Mental Capacity Act.

4.4 Staff know how the Mental Capacity Act defines restraint. They know that it is lawful to restrain someone who lacks mental capacity in the person's best interests, when the person lacks the mental capacity to consent to what staff want to do, but only if they reasonably believe, not only that the person does lack capacity and what is proposed is in their best interests, but also that the restraint is both:

- **Necessary to prevent harm** to the person, and also
- That it is a **proportionate response** to the likelihood and seriousness of that harm

4.5 They know that any necessary and proportionate restraint must be used for the shortest possible time. They seek to learn from incidents of restraint to find ways to avoid or minimise its use in the future.

4.6 Staff know that if restraint of a person lacking capacity to consent amounts to a deprivation of liberty, it must be specially authorised, in order to protect the human rights of the Service User by allowing them to challenge the restrictions in the Court of Protection.

4.7 Staff know that the Mental Capacity Act does not allow a person to be deprived of their liberty in community settings such as domiciliary care, supported living, extra-care housing or shared lives, unless this receives direct authorisation from the Court of Protection.

4.8 Staff in a community setting know that, if a Service User is deprived of their liberty, the provider must ask the Commissioner or Local Authority to apply directly to the Court of Protection for authorisation. The authorisation process is described in the Deprivation of Liberty in Community Settings Policy and Procedure at Pol Community Care Ltd.

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5. Procedure

5.1 Staff at Pol Community Care Ltd know and work within the Mental Capacity Act principles and codes of practice, including how to recognise the deprivation of liberty of someone lacking mental capacity, and how then to proceed.
5.2 All staff of Pol Community Care Ltd are given training in the Mental Capacity Act. References to training resources can be found in the Underpinning Knowledge/References section of this policy.
5.3 Pol Community Care Ltd makes available to staff, documents and resources about the Act, including training resources, which are available under 'Useful Documents' in your QCS system.
5.4 Any assessment of a Service User's mental capacity is **decision specific** and **time specific** to decide whether they can make a particular decision at the time it needs to be made. There must **never** be a generalised statement that someone lacks mental capacity. It is never enough to say that the Service User lacks mental capacity because of a diagnosis (such as dementia), or because of their age, or because of their appearance.
5.5 Some people lack mental capacity over a long period of time for many kinds of decisions, and it is not necessary to carry out repeated formal capacity assessments. However, capacity must always be reviewed whenever a Service User's Care Plan is being developed or reviewed, or there appears to be some change in their capacity to make decisions, or when they lack capacity for a major decision that needs to be made, for example, about where to live, or whether to have serious medical treatment.
5.6 There is no requirement in the Mental Capacity Act 2005 to complete any specific documentation regarding assessments of capacity and subsequent decisions made on their basis. However, paid staff only receive protection from liability when they can prove that they have come to 'reasonable' decisions about capacity and best interests, and some form of documentation is essential evidence of that process.
5.7 For day-to-day decisions, Care Workers always work to a Care Plan which is clearly based on assessments of capacity and best interests. For more important decisions, it is certainly good practice for capacity assessments and best interests decisions to be recorded. This can be done by completing the forms accompanying this policy with the Service User.
5.8 Remember that, when assessing a Service User's capacity, the person does not have to prove to you that they **have** capacity to make a certain decision. It is up to the person who will make decisions on behalf of the Service User to prove that, on the balance of probabilities, the Service User **lacks** the mental capacity to make this decision.
5.9 Do not set out to 'fail' someone; give Service Users all the help you can to enable them to make their own decisions. Take your time: **a good capacity assessment is a conversation and must not be rushed**. For some people, having a Care Worker or a family member to sit with them during the assessment process may be reassuring and help them relax and feel comfortable.
5.10 Make sure that the record of the assessment is completed fully, that it is signed by the assessor and that it is dated. This form must be kept with the Care Plan so it is readily available and can be revisited in the future when reviewing aspects of the Service User's care.
5.11 If it is determined that the Service User does not have the mental capacity to make a particular decision at the time it needs to be made, any action taken or any decision made must be in his or her best interests.
5.12 If there is a dispute about best interests, firstly ensure that you have followed the mandatory best interests checklist, and tried, in particular, to make a decision that is in alignment with what the Service User wants. The following must be considered:

- Family and friends will not always agree about what is in the best interests of an individual. However, they usually have greater knowledge than Care Workers of what this Service User would have wanted, and sometimes of what the Service User now wants
- If you are the decision-maker, you will need to clearly demonstrate in your record keeping that you have made a decision based on all available evidence and taken into account all conflicting views. You will take particular care to look for the option that is the least restrictive of the Service User's rights

5.13 If there is a dispute, the following things might assist you in determining what is in the Service User's best interests:

- Involve an advocate who can represent the Service User who lacks mental capacity for this decision, to help their wishes and feelings to be central to the decision-making
- In some situations, a best interests meeting is a good idea, to identify all the possible options and

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explore the pros and cons of each

- Go to mediation
- An application could be made to the Court of Protection for a ruling. This would normally be undertaken by the relevant Local Authority or NHS Trust when a complex and serious decision is to be made. If relatives/friends are not permitted to see or speak to the Service User alone, or sometimes even not allowed to visit, it is essential to resolve the dispute with relatives or friends, or ask the Local Authority urgently to request the Court to make a best interests decision for this person
- You must ensure that all documents you complete are both signed and dated

5.14 In making a decision in someone's best interests, the following **must** be taken into account (except in an emergency, when there is no time). The following checklist is a mandatory requirement under the Mental Capacity Act of matters to consider by a decision-maker:

- Is the person likely to regain the mental capacity to make this decision and, if so, can this decision wait until then?
- Do everything possible to encourage the person to take part in the making of the decision, even though they lack the capacity to make the decision
- Give great weight to the person’s past and present wishes and feelings (in particular if they have been written down)
- Identify any beliefs and values (e.g. religious, cultural or moral) that would be likely to influence the decision in question
- Include any other factors that would be relevant and important to this person if they were able to make their own decision
- Be sure that you are not making assumptions about this person's best interests simply based upon the person's age, appearance, condition or behaviour
- As far as possible, the decision-maker must consult other people who might have views on the person's best interests and what they would have wanted when they had mental capacity, especially the following people:
  - Anyone previously named by the person lacking capacity as someone to be consulted
  - Carers, close relatives, friends or anyone else interested in the person’s welfare
  - Any attorney appointed under a Lasting Power of Attorney
  - Any deputy appointed by the Court of Protection to make decisions for the person

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6. Definitions

6.1 Mental Capacity Act

- The Mental Capacity Act 2005, covering England and Wales, lays out a legal framework for people who lack capacity to make decisions for themselves, or who have capacity and want to make preparations for a time when they might lack capacity in the future
- It sets out who can take decisions, in what situations, and how they should go about this
- Most of the MCA applies to people from the age of 16 upwards
- Certain parts, such as the right to make an advance decision to refuse treatment or appoint attorneys under a Lasting Power of Attorney, only relate to people aged 18 and over

6.2 Test for Capacity

- The Act sets out a two-stage test for assessing whether a person lacks capacity to take a particular decision at the time it needs to be made. It is a 'decision-specific and time-specific' test, and must be recorded in a way that explains why you have reached the conclusions to answer these questions:
  - Firstly, is this person facing a decision that they are unable to make, even with all help that can be given?
  - Secondly, is this inability BECAUSE OF some impairment or disturbance in their mind or brain, whether short-term or permanent?
- The person has capacity for this decision if they can do all of the following:
  - Understand appropriately presented information about the decision to be made
  - Retain that information for long enough to use or weigh that information as part of the decision-making process
  - Use or weigh that information as part of the decision-making process
  - Communicate their decision (by talking, sign language or any other means)

6.3 Best Interests

- Everything that is done to, or on behalf of a person who lacks capacity must be in that person's best interests. The Mental Capacity Act does not define best interests, but lays out how best interests decisions must be made. The Act provides a checklist of factors that decision-makers must work through, except in an emergency, in deciding what is in a person's best interests. A person can put his/her wishes and feelings into a written statement if they so wish, which the person making the decision must consider

6.4 Lasting Power of Attorney (LPA)

- The Act allows a person aged 18 and over, who has capacity to make this decision, to appoint attorneys to act on their behalf if they should lose capacity in the future. There are two types of LPA, one to make health and welfare decisions, and the other to make finance and property decisions. The provision replaces the previous role of Enduring Power of Attorney (EPA)
- Staff should be aware of any LPA in place for Service Users in their care; they should know which individuals have been given powers to make which specific types of decisions

6.5 Court Appointed Deputies

- The Act provides for a system of court appointed deputies to replace the previous system of receivership in the Court of Protection. Deputies are able to take decisions on welfare, healthcare and financial matters as authorised by the Court but are not able to refuse consent to life-sustaining treatment
- They are only appointed if the Court cannot make a one-off decision to resolve the issues, and if the person has already lost capacity to make these decisions. Staff should be aware of any Court appointed deputies in place for Service Users in their care, and of what decisions any deputy is authorised to make

6.6 Court of Protection

- The Court of Protection has jurisdiction relating to the whole Act and is the final arbiter for capacity matters. It has its own procedures and nominated judges

6.7 Advance Decision to Refuse Treatment (ADRT)

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- The Act creates ways for people aged 18 and over to make a decision in advance to refuse medical treatment if they should lose capacity in the future. This is called an advance decision to refuse treatment.
- An advance decision to refuse treatment that is not life-sustaining does not need to be in writing, but the person must ensure that professionals know what treatment(s) the person is refusing
- A person who is refusing in advance, life-sustaining treatment, must make sure that their advance decision meets certain requirements. These are that the decision must be in writing, signed and witnessed, with a clear statement of which treatment or treatments the person is refusing. In addition, there must be an express statement that the person understands that this may put their life at risk but that the decision stands even if it does so
- A person can only refuse specified medical treatments; they cannot insist on any particular treatment
- Carers must be clear
  - Whether an advance decision to refuse treatment exists
  - What is in it, and
  - Where it is to be found

  Any doctor or paramedic needs to know if treatment they might suggest would be lawful or whether the person has refused it in advance.

6.8 Independent Mental Capacity Advocate (IMCA)

- An IMCA is a specific kind of 'non-instructed' advocate, who can only be appointed by a Local Authority or NHS body, in certain circumstances, to support a person who lacks capacity but has no one except paid carers interested in their welfare
- The IMCA makes representations about the person’s wishes, feelings, beliefs and values, whilst bringing to the attention of the decision-maker all factors that are relevant to the decision. The decision-maker must consider the views of the IMCA but is not bound by them
- Carers need to know if an IMCA is going to visit the person, to receive them as a colleague after checking their identity; the IMCA has the right to speak with the Service User alone if they wish, and the right to see notes relevant to the decision that is to be made

6.9 Restraint

- The Mental Capacity Act defines restraint of a person lacking mental capacity to consent to the action for which restraint is needed as:
  - The use, or threat of use, of force to make someone do something they are resisting, or
  - The restriction of a person's freedom of movement, whether they are resisting this or not

6.10 Protection from Liability

- The Mental Capacity Act allows carers, healthcare and social care staff to carry out certain tasks for, or on behalf of people whom they reasonably believe to lack capacity to consent to these actions, without fear of liability

  For actions to receive protection from liability, the worker must
  - Reasonably believe the person lacks capacity to consent to or refuse the proposed actions
  - Reasonably believe the actions they propose are in the person's best interests, and
  - Reasonably believe they have found the least restrictive option to meet the identified need

  Note that two extra conditions apply for the use of restraint. Any action intended to restrain a person who lacks capacity will not attract protection from liability unless the following **two conditions are also met**:
  - The person taking action must reasonably believe that restraint is **necessary to prevent harm to the person**, and
  - The amount or type or restraint must be a **proportionate response to the likelihood and seriousness of that harm**

6.11 Deprivation of Liberty

- A person who lacks capacity to consent to or refuse the Care Plan that keeps them safe is deprived of their liberty if this Care Plan shows that they are:
  - Under complete and effective supervision and control by staff (this may not always be 'line of sight' supervision, but staff prevent the person from acting in a way that would cause them harm, and

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know at all times pretty well what they are doing) *and* they are
- Not free to leave the place where they are being cared for (in the sense of leaving to go and live somewhere else if they choose, or go away on a trip without permission from others)

6.12 Authorisation of Deprivation of Liberty

- In community settings such as when receiving care in their own home, supported living, extra-care housing or shared lives schemes, a person aged 16 or older who is deprived of their liberty to give them necessary care or treatment **must have their rights protected by having the situation authorised by the Court of Protection**. This is arranged by the commissioner of the service or, for self-funders, the Local Authority. If Pol Community Care Ltd suspects that a Service User is deprived of their liberty they must notify the Commissioner or Local Authority

Key Facts - Professionals

Professionals providing this service should be aware of the following:

- When a person aged 16+ lacks capacity to consent to care, deprivation of liberty is only permitted if it has been authorised by the Court of Protection; this is arranged by the Commissioner or the Local Authority
- Guidance on the Act is provided in the MCA Code of Practice. Because it is a statutory code, those working with people who lack mental capacity are expected to follow its guidance or have extremely good reasons why they did not
- The Act introduces new criminal offences of ill treatment or neglect of a person who lacks capacity. A person found guilty of such an offence may be liable to imprisonment for a term of up to 5 years
- The Mental Capacity Act 2005 provides a statutory framework to empower and protect people aged 16+ who are not able to make their own decisions. It makes it clear who can take decisions, in which situations, and how they must go about this. It enables people to plan ahead for a time when they may lose capacity

Key Facts - People affected by the service

People affected by this service should be aware of the following:

- The Mental Capacity Act (MCA) puts into law, existing best practice about people who lack mental capacity and those who take decisions on their behalf. It provides ways for anyone to plan ahead for a time when capacity might be lost. It also puts an obligation on paid staff to find the least restrictive, most person-centred ways possible to care for someone who lacks mental capacity and keep them safe
- Where a decision needs to be made for someone who lacks the capacity to make that decision, the decision must be made in the person's best interests. The decision-maker must take into account the person's wishes and the views of friends and family in making those decisions

Further Reading

As well as the information in the 'underpinning knowledge' section of the review sheet we recommend that you add to your understanding in this policy area by considering the following materials:

National Institute for Health and Care Excellence: Decision-making and mental capacity:
https://www.nice.org.uk/guidance/ng108
National Institute for Health and Care Excellence: Decision-making and mental capacity:
https://www.nice.org.uk/guidance/QS194

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Outstanding Practice

To be ‘ outstanding ’ in this policy area you could provide evidence that:

- Decisions or choices made by Service Users who lack capacity are respected as far as possible, while keeping the Service User safe
- The wide understanding of the policy is enabled by proactive use of the QCS App
- All relevant staff can identify the principles of the Mental Capacity Act 2005
- Service Users are helped and supported in several ways and on a regular basis to make decisions for themselves
- Staff can describe the difference between restrictions and restraint allowed by the Mental Capacity Act and a deprivation of liberty
- Current good practice materials, including technology, are available to help Service Users who need support in decision making
- Service Users with capacity are not prevented by the service from making decisions, even though others may disagree with their choices

Forms

The following forms are included as part of this policy:

Title of form	When would the form be used?	Created by
Essential MCA Information - CR46	To log essential information at the start of service delivery or when reviewing Care Plans	QCS
Capacity Assessment Form - CR46	When creating or reviewing Care Plans if there is doubt whether the person has capacity to consent to receiving the services proposed	QCS
Care Planning: Best interests decision-making form - CR46	When a person has been assessed as lacking capacity to create their own Care Plan or consent to receiving services	QCS

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1. Has the Service User created Lasting Powers of Attorney (LPA) for:		
Property and Finance?	**Yes**	**No**
Health and Welfare?	**Yes**	**No**
If the answer for either of the above is 'yes', please use the below space to record their details. Use additional pages as necessary.		
Property and Finance LPA		
Names and contact details of attorneys:		
Has the LPA been registered with the Office of the Public Guardian (OPG)?	**Yes**	**No**
What decision-making powers have been given, or withheld?		
Health and Welfare LPA		
Names and contact details of attorneys:		
Has the LPA been registered with the Office of the Public Guardian (OPG)?	**Yes**	**No**
What decision-making powers have been given, or withheld?		

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2. Is there a Deputy appointed by the Court of Protection? If the answer is 'yes', please complete their details below.	**Yes**	**No**
Name and contact details of Deputy:		
Briefly note what powers are given by the deputyship order:		

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3. Has the person made an Advance Decision (AD) to refuse treatment?	**Yes**	**No**
If 'No', and there is no reason to think the person lacks mental capacity to do this, do they understand that they can make an AD if they wish, but do not have to? Record briefly below any discussions you have had with the person on this topic.		
3.A If 'Yes' they have made an AD, does it relate to potentially life-sustaining treatment?	**Yes**	**No**
If 'Yes': You should have a copy of this. **If 'No':** Record below any details of verbal advance decisions to refuse treatment, with a signature from the person to confirm you have correctly recorded their wishes. If they lack mental capacity to give this confirmation, record how you learned of the advance decision.		
Details of any verbal advance decisions to refuse treatment: Signed by: _________________________________ Date:____________		

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4. Has the person made any advance statements of wishes?	**Yes**	**No**
If 'Yes': You should have a copy of this. **If 'No':** If the person has mental capacity to decide details of how they might like to be treated if they no longer had mental capacity, it is good practice to encourage them to make any advance statements they wish, to be recorded here.		
Advance statements: Signed by: ________________________________ Date:____________		

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Notes for Question 1:

- LPAs must be registered with the Office of the Public Guardian before they can be used. If the LPA is registered, each page will have a mark saying 'Validated – OPG'
- An LPA for property and finance, once it has been registered, CAN be used while the person has mental capacity to manage their own affairs, but only with their permission
- An LPA for health and welfare can ONLY be used once it has been registered, if the person who created it lacks the mental capacity to make a particular decision at the time it needs to be made. People must make their own health and care decisions if they have the mental capacity to do so
- A person creating an LPA can personalise it, if they wish, by giving the attorney the power to make some decisions but not others. Therefore, it is important that you note BOTH who the attorneys are, AND what decisions the attorney has the power to make. This is particularly important with LPAs for health and welfare, since the attorney might have the power to consent to or refuse life-sustaining treatment on behalf of the person, or that power might have been withheld
- Attorneys making decisions under an LPA have a duty, just as you do, to act within the Code of Practice of the MCA. This means you should give them the information they need to make a particular decision, if the person lacks capacity to do this. It also means that, if you think an attorney is failing to act in the best interests of the person, you must immediately tell the Office of the Public Guardian. They will then investigate. Examples of poor practice might be: if there is a property/finance LPA, failing to provide the person with money for toiletries or hair-dressing, or being in arrears with the fees; or, if they have a health/welfare LPA, refusing to let the person go to the church of their choice. **If you have concerns about any actions of an LPA attorney, you should tell the OPG as a matter of urgency**
- Within the possible limits explained in (4) above, you should think of the attorney as 'standing in the shoes' of the person who has given them the powers; they can make decisions as if they are the person receiving services

For further information, see MCA Code of Practice chapter 7.

Notes for Question 2

For further information, see MCA Code of Practice chapter 8.

Notes for Question 3:

- An advance decision to refuse treatment is a powerful legal tool to make sure someone is not given treatment they would not want, when they lack capacity to consent to it. If an advance decision is valid (made correctly) and applicable (relates to the treatment being considered), it is as if the person is refusing that treatment with capacity; the treatment cannot then be given
- **Please do not** use phrases such as 'living will' or 'advance directive' since these are confusing and have no legal power
- Nobody **has** to make an advance decision to refuse treatment. If a person has not done so, decisions are made in the best interests of the person, taking account of what is known about their past and present wishes and feelings
- An advance decision to refuse treatment can only be a refusal of medical treatment. This can include Clinically Assisted Nutrition or Hydration (CANH) but a person cannot refuse 'basic care', such as being kept warm, clean and comfortable, and being offered nutrition or hydration by mouth
- It is not possible to make an advance decision to refuse admission to a care home
- A person with mental capacity can make, change, or cancel an advance decision at any time. You may need to help them get their decision updated at their GP practice or hospital providing treatment
- If there is an advance decision to refuse treatment, but it is not about life-sustaining treatment, it does not, in law, need to be in writing. But in order to honour it, it is important that it is described in the records of the care provider and the GP
- If there is an advance decision that relates to potentially life-sustaining treatment, it must be in writing, in the person's own words, signed by them (or in their presence, if they physically cannot sign), and witnessed. It must also contain a statement that the person understands that this may shorten their life, but they wish it to apply anyway

For further information, see MCA Code of Practice chapter 9.

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Notes for Question 4:

- Advance statements of wishes are not legally binding, but it is good practice to encourage people to think about the ways they would like to be cared for if they should lose mental capacity
- Providers must give any written statement real weight in deciding on the Care Plan of someone who lacks mental capacity to decide their own Care Plan
- Whether written or not, advance statements of wishes should be considered, recorded as relevant, and honoured wherever possible in best interests decision-making
- An example of advance statements might be: 'If I lack mental capacity to consent to medication, I would like staff to know I have difficulty swallowing large tablets and do better if they can be hard-coated and shaped for easier swallowing; and I need a large glass of water, and not to be rushed.' Or, 'If I lack mental capacity, I would like staff to know that I have always loved dogs and would like my Care Plan to continue to incorporate PAT dogs if possible.'

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Notes:

1. If there is no reason to think that the person might lack mental capacity, there is no need to carry out a capacity assessment.
2. Remember that nobody needs to prove they have capacity. But if you plan to act on behalf of an individual in their best interests, under the MCA, you must show that, on balance, the person lacks mental capacity.

Person's name:
Name and role of person completing this form: Date:___________
Nature of decision: (for example, 'consenting to necessary medication', 'consenting to the use of bed-rails at night' or 'consenting to be helped with intimate personal care')

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Step 1		
1. Is there any impairment of, or disturbance in the functioning of the person's mind or brain? (such as dementia, a stroke, a neurological condition, use of alcohol, or any other temporary or permanent problem)	**Yes**	**No**
If 'No': The Mental Capacity Act cannot be used as a framework for decision-making unless there is some impairment or disturbance as described above. **Do not continue.** **If 'Yes':** Describe below the nature of this impairment or disturbance. If you do not know its cause, you should describe it, for example, 'confusion and memory loss, cause not established').		

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Step 2		
2. You must decide whether this impairment or disturbance means that the person cannot make the specific decision referred to in this form. To do that, you need to consider the four steps which the MCA says a person has to be able to do, in order to make a decision. If a person cannot carry out all of these steps, with as much support as possible, then they lack mental capacity for this decision at this time.		
2A. Can the person **Understand** information relating to the decision (suitably expressed, and without unnecessary detail)?	**Yes**	**No**
If 'No', describe below how you tried to explain the information, and how you know the person did not understand it		
2B. Can the person **Retain** that information at least for a short while?	**Yes**	**No**
If '**No**', describe below how you know the person could not remember the information for long enough to use it		

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2C. Can the person **Use** or weigh it to make their decision?	**Yes**	**No**
If 'No', describe below how you know the person was not able to use or weigh the information		

2D. Can the person **Communicate** the decision by any means?	**Yes**	**No**
If 'No', describe how you tried to help the person to communicate their decision, and why they were unable to do so		

If '**Yes**' throughout, the person has capacity for this decision. You cannot make a best interests decision on this person's behalf; they have the right to make their own decisions.
If 'No' at any stage, the person does not have capacity and a best interest decision has to be made. Explain below why you think that the problem in the person's mind or brain is the reason why they cannot do at least one of them. *For example, you might write: 'Maria is often convinced she is on the staff here, and this delusion stops her being able to understand why she cannot go 'home' to her mother at tea-time' or 'Mr Smith's dementia has seriously affected his short-term memory, and this means he cannot remember his need to take his medication however often he is reminded.'*
Use additional pages as necessary.

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Service User's Name
Nature of decision facing the person:
Name and role of person completing this form: Date:___________

Step 1: Is the person likely to regain capacity?		
1. Is the person likely to regain capacity and, if so, can the decision wait?	**Yes**	**No**
If '**Yes**', record how you are encouraging the person to regain capacity. If '**No**', continue with best interests decision-making.		

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Step 2: Check the 'Essential Information' form		
2A. Is there an Advance Decision to Refuse Treatment, relevant to this decision? (For example, a decision to refuse a certain medication which is being proposed?)	**Yes**	**No**
If '**Yes**', and the Advance Decision is valid and applicable, this medication cannot be given. If '**No'**, continue with best interests decision-making.		
2.B Is there any other person with legal powers to make this decision?	**Yes**	**No**
If '**Yes**': Notify them of the decision, and offer to help them with any relevant information. If '**No**', continue with best interests decision-making.		

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Step 3: The best interests checklist		
3A. What are the person's present wishes and feelings about this decision? Do they feel strongly one way or another?	**Yes**	**No**
If '**Yes**': Do all you can to make a decision that fits with their wishes and feelings. Record below how you are trying to do that. If '**No**': Proceed with best interests decision-making.		

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3B. Who cares about this person's welfare and what are their views?

- **Name of person consulted in making this decision** - for example, GP, Practice Nurse, District Nurse, Social Worker, Named Carer
- **Contact details** - Record how you have consulted them (by phone, email, face to face, best interests meeting)
- **Record opinions** - give short direct quotes if possible. Include differences of opinion
    - For example, what do they think the person would want if they had capacity? What can they tell you about the person's culture, beliefs, personal history, and anything else that might influence how this person would think about this decision?

Name of person consulted and date	Contact details	How were they consulted?	Record opinions

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3C. Confirm that you are avoiding discrimination: The MCA says you must not make assumptions about best interests simply on the basis of the person's age, appearance, condition or behaviour.	**Yes**	**No**
3D. If the decision concerns life-sustaining treatment: You must not be motivated in any way by a desire about the person's death. Confirm that you are not making assumptions about the person's quality of life.	**Yes**	**No**
3E. Avoid restricting the person's rights: See if there are other options that may be less restrictive of the person's rights; record below what less restrictive options you have considered and why you have discounted them (*For example, you may have tried them and they do not meet the person's needs).* **Record here:**	**Yes**	**No**
3F. Weigh up all these factors, and anything else that this particular individual would take into account if they had capacity, to reach a best interests decision.	**Yes**	**No**
3G. Ensure that the Care Plan makes it clear to staff how to carry out this decision, in daily practice. Front-line staff are protected from liability provided they are following a Care Plan based on assessments of capacity and best interests as laid out here.	**Yes**	**No**
Additional Notes:		

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Examples of Best Interest Decisions

Example 1: Lawful restriction of someone's freedom of movement

Jim lives in a supported living setting; he has a learning disability and no speech. When anxious or when staff don't understand what he wants, he likes to go and look at lorries. In the past, he's been brought home by the police from the hard shoulder of the motorway on these occasions. It is in his Care Plan that he only goes out with staff: this is a restraint so must be necessary to prevent harm to Jim, and a proportionate response to how likely and serious that harm would be.

When he moved into supported living, Jim's mum sent with him a box of lorry videos and model trucks: the Care Plan says that, when anxious, Jim should be helped to enjoy these. Outings to the local lorry park, with relatives or staff, are built into the Care Plan.

In the search for ways to limit the restrictions on his freedom, staff are sent on training courses to learn how better to communicate with Jim so that he does not so often become frustrated and anxious.

Example 2: Personal Care:

The completed capacity assessment shows that, on the balance of probabilities, Mrs X lacks the mental capacity to consent to personal care interventions due to her dementia. The best interests decision-making process has determined that it is in her best interests to have such personal care delivered in the least restrictive way possible. Staff are to:

- Make sure she is fully awake and has her hearing aids in, and glasses on, which will help her understand what is happening
- Explain slowly and carefully, at each stage, what actions staff will carry out
- Start with washing her face and hands gently in warm water follow up with her hand cream and encourage her to brush her hair; she enjoys this
- Stay calm, keep good eye contact when explaining
- If she is particularly upset by staff actions, leave her as comfortable as possible, with her radio on her favourite channel (Radio 4) and move to other tasks if possible and then return
- Recognise that, if they need to hold her arms, this is a restraint: they need to record this in the daily notes and tell their manager. To be legal, any restraint must be **necessary to prevent harm to her**, and a **proportionate response** to the likelihood and seriousness of that harm. Restraint must be the gentlest possible, for the shortest possible period of time.

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