

Dementia Care TLC

Mental Capacity Act 2005 Policy & Procedure



	Low	Medium	High	Critical
Business Impact:	X			
Minimal action required circulate information amongst relevant parties.				

Purpose

- . To meet the provisions of the Mental Capacity Act 2005.
- . To support Dementia Care TLC in meeting the following Key Lines of Enquiry:

Key Question	Key Line of Enquiry (KLOE)
SAFE	S2: How are risks to individuals and the service managed so that people are protected and their freedom is supported and respected?
EFFECTIVE	E2: Is consent to care and treatment always sought in line with legislation and guidance?
CARING	C2: How does the service support people to express their views and be actively involved in making decisions about their care, treatment and support?

- . To meet the legal requirements of the regulated activities that Dementia Care TLC is registered to provide:
 - . The Care Act 2014
 - . Human Rights Act 1998
 - . Mental Capacity Act 2005
 - . Mental Capacity Act Code of Practice

Scope

- . The following roles may be affected by this policy:
 - . All workers delivering support or care
- . 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
- . The following stakeholders may be affected by this policy:

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

Objectives

- . To ensure adherence to the statutory framework to empower and protect vulnerable people who are not able to make their own decisions; to support them to plan ahead, if they wish, for a time when they may lose capacity.
- . To ensure those working with an adult who lacks capacity will make specific decisions that are in the person's best interests, and the least restrictive of their rights.
- . To comply with the five principles of the Mental Capacity Act 2005.
- . To build confidence among staff regarding how and when to assess someone's mental capacity, and how to make best interests decisions when necessary.
- . To ensure that staff are aware of their responsibilities and that they are legally protected as they have followed the principles of the Mental Capacity Act.

Policy

- . To ensure staff 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
 - The right for individuals to 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 retain the right to make what might be seen as eccentric or unwise decisions
 - Best interests – anything done for or on behalf of people without capacity must be in their best interests
 - Least restrictive option - before any act is done or decision made, staff must consider if they have found the option that is the least restrictive of the person's basic rights and freedoms
- . To ensure that staff understand the importance of helping people to make their own decisions:
 - Staff will know how to present the right information in the right way, including being clear about all the available options
 - Staff actively look for the best ways to communicate with an individual
 - Staff put the person 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
- . When a person lacks the mental capacity to make a particular decision, everything that is done for or on behalf of that person must be in the person's best interests. In working out what is in someone's best

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interests, staff will consider the full mandatory checklist of factors laid out in the Mental Capacity Act.

. It is Dementia Care TLC policy not to use any type of restraints.

. Staff will be aware that the Mental Capacity Act does not allow a person to be deprived of their liberty unless that deprivation is authorised by the Deprivation of Liberty Safeguards (DoLS) as explained in Schedule A1 of the Mental Capacity Act, or by direct authorisation by the Court of Protection. Where a Service User is, or will be, looked after in a care home or hospital, in circumstances that might amount to a deprivation of liberty, authorisation under the DoLS should be sought.

. Where the person is in a community setting, such as supported living, shared lives or extra-care housing, the DoLS cannot be used. In this case, 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 Safeguards Policy and Procedure.

. When a Service User is facing a major decision about serious medical treatment or where to live, **and** lacks the mental capacity to make that decision even with all possible help, **and** has no relatives or close friends, apart from paid staff, available to be consulted as part of making the decision in their best interests, a local authority or NHS body **must** instruct an Independent Mental Capacity Advocate (IMCA).

The IMCA does not become the decision-maker, but the decision-maker must take account of the IMCA's views. Staff must know that an IMCA has the right to see information relevant to the decision that has to be made, and to speak with the person, alone if they wish.

The Mental Capacity Act Code of Practice, in chapter 10, gives more information about the role of the IMCA.

Procedure

. Maintain awareness amongst all staff of the Mental Capacity Act principles and practice, including how to recognise the deprivation of liberty of someone lacking mental capacity, and how then to proceed.

. All staff of Dementia Care TLC will be given training in the Mental Capacity Act. References to an e-learning training resource can be found in the further reading section of this policy, and in the underpinning knowledge section of the review sheet at the front of the policy.

. Seek advice from the QCS support line (**0333 405 33 33**) in the event of any questions arising.

. Make available to staff documents and resources about the Act, including training resources, which are available under Useful Documents in your QCS system.

. Any assessment of someone's mental capacity will be **decision specific** and **time specific** to decide whether someone can make a particular decision at the time it needs to be made. There should **never** be a generalised statement that someone lacks mental capacity. It is never enough to say that the person lacks mental capacity because of a diagnosis (such as dementia), or because of their age, or because of their appearance.

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. 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 should always be reviewed whenever a Care Plan is being developed or reviewed, or when major decisions need to be made.

. 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 they have come to 'reasonable' decisions about capacity and best interests, and some form of recording is essential evidence of that process.

. For day to day decisions, care workers should 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 interest decisions to be recorded. This can be done using the attached forms with the Service User.

. Remember that, when assessing someone'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 person to prove that, on the balance of probabilities, the person lacks mental capacity to make this decision.

. Do not set out to 'fail' someone: give people all the help you can to enable them to make their own decisions. Take your time: **a good capacity assessment is a conversation, and should not be rushed.** For some people, having a member of staff or a family member to sit with them during the assessment process may be reassuring, to help them relax and feel comfortable.

. Make sure the record of the assessment is completed fully, that it is signed by the assessor and that it is dated. This form should 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.

. If it is determined that the person 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.

. 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 person him or herself wants. The following should 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 staff of what this person would have wanted, and sometimes of what the person 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 should take particular care to look for the option that is the least restrictive of the person's rights

. If there is a dispute, the following things might assist you in determining what is in the person's

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best interests:

- Involve an advocate who can represent the person 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 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 take the person home or sometimes even not allowed to visit, it is essential to solve 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 should ensure that all documents you complete are both signed and dated

. 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 on 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

Definitions

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

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- Most of the MCA applies to people from the age of 16 upwards
- Certain parts, such as the Deprivation of Liberty Safeguards and 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

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
- Firstly, is there an impairment of, or disturbance in the functioning of, a person's mind or brain? (This may be temporary or permanent)
- Secondly, BECAUSE OF this impairment or disturbance, is this person unable to make a particular decision?
- The person has capacity for this decision if they can do all of the following:
 1. Understand appropriately presented information about the decision to be made
 2. Retain that information, for long enough to
 3. Use or weigh that information as part of the decision-making process
 4. Communicate their decision (by talking, sign language or any other means)

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

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

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

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authorised to make

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

Advance Decision to Refuse Treatment (ADRT)

- The Act creates ways for people aged 18 and over to make a decision in advance to refuse 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 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 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

Independent Mental Capacity Advocate (IMCA)

- An IMCA is an advocate 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 who are interested in their welfare
- The IMCA makes representations about the persons wishes, feelings, beliefs and values, while 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

Key Facts - Professionals

Professionals providing this service should be aware of the following:

- 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 should go about this. It enables people to plan ahead for a time when they may lose capacity
- The Deprivation of Liberty Safeguards (DoLS) were added to the Mental Capacity Act, with effect from 2009. DoLS provide for a procedure to authorise the deprivation of the liberty of a person aged 18+, in a care home or hospital, in their best interests. The policy and procedure regarding this part of the Act is contained in the QCS Deprivation of Liberty Safeguards Policy and Procedure
- Guidance on the Act is provided in a statutory Code of Practice. While there is no legal duty on anyone to 'comply' with the 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

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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 should 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:

Outstanding Practice

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

- That all 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 people who need support in decision making
- People using service with capacity are not prevented from making decisions, even though they may appear to be bad decisions

Forms

The following forms are included as part of this policy:

Title of form	When would the form be used?
Essential MCA Information	To record legal future planning
Capacity Assessment form	To record when a person lacks the mental capacity to make a decision they are facing, at the time the decision needs to be made.

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Care Planning: Best interests decision-making form	You should only use this form if the Mental Capacity Assessment form has been completed, and the person appears on the balance of probability to lack the mental capacity to make a specified decision at the time it needs to be made.
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Essential MCA Information

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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3. Has the person made an Advance Decision (AD) to refuse treatment?	Yes	No
<p><i>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.</i></p>		
A. If 'Yes' they have made an AD, does it relate to potentially life-sustaining treatment?	Yes	No
<p>If 'Yes':</p> <p>You should have a copy of this.</p> <p>If 'No':</p> <p><i>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.</i></p>		

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Details of any verbal advance decisions to refuse treatment:

Signed by: _____ Date: _____

4. Has the person made any advance statements of wishes?	Yes	No
<p>If 'Yes':</p> <p>You should have a copy of this.</p> <p>If 'No':</p> <p>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.</p>		

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Advance statements:

Signed by: _____ Date: _____

Notes for Question 1:

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- 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 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 more information, see MCA Code of Practice chapter 7.

Notes for Question 2

For more 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

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- 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.

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'

Capacity Assessment form

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:

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Nature of decision: (for example, 'consenting to necessary medication', 'consent to the use of bed-rails at night' or 'consenting to be helped with intimate personal care')

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

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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

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If 'No', describe below how you know the person could not remember the information for long enough to use it

2C. Can the person **Use** or weigh it to make their decision

Yes

**N
o**

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

**N
o**

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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.

Care Planning: Best interests decision-making form

Service User's Name

Nature of decision facing the person

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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
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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

A. 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.

.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.

Step 3: The best interests check-list

A. What are the person's present wishes and feelings about this decision? Do they feel strongly one way or another?

Yes

No

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

- **Name of person consulted in making this decision** - for example: Relatives or friends, 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.

<i>Name of person consulted and date</i>	<i>Contact details</i>	<i>How were they consulted?</i>	<i>Record opinions</i>

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<p>C. 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.</p>	Yes	No
<p>D. 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.</p>	Yes	No
<p>E. 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 (<i>For example, you may have tried them and they do not meet the person’s needs</i>).</p> <p>Record here:</p>	Yes	No
<p>F. 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.</p>	Yes	No
<p>G. 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.</p>	Yes	No

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Additional Notes:

Examples of Best Interest Decisions Example

1: Use of bed-rails

On the balance of probabilities, Mr Y lacks the mental capacity, due to his acquired brain injury which affects his memory, to consent to the use of bed-rails to prevent him falling out of bed at night (see capacity assessment for this decision). After several falls, which only occur at night when he is very sleepy, a best interests decision was made that bed-rails are in his best interests, and the least restrictive option to prevent falls at night. See best interests decision-making record.

Example 2: Personal Care:

The completed capacity assessment shows that, on the balance of probabilities, Mrs X lacks 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*

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- 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: the she enjoys these
- 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 return within half an hour

Essential MCA Information

1. Has the {Service_user_text} 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		

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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?

Essential MCA Information

2. Is there a Deputy appointed by the Court of Protection?

Yes

No

If the answer is yes, please complete their details below.

Name and contact details of Deputy:

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Briefly note what powers are given by the deputyship order:

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Essential MCA Information

3. Has the person made an Advance Decision (AD) to refuse treatment?	Yes	No
<p><i>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.</i></p>		
3.A If 'Yes' they have made an AD, does it relate to potentially life-sustaining treatment?	Yes	No
<p>If 'Yes':</p> <p>You should have a copy of this.</p> <p>If 'No':</p> <p><i>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.</i></p>		

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Details of any verbal advance decisions to refuse treatment:

Signed by: _____ Date: _____

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Essential MCA Information

3. Has the person made any advance statements of wishes?	Yes	No
<p>If 'Yes':</p> <p>You should have a copy of this.</p> <p>If 'No':</p> <p>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.</p>		

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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 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 more information, see MCA Code of Practice chapter 7.

Notes for Question 2

For more 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

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- 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.

Essential MCA Information

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_name} of someone who lacks mental capacity to decide their own {Care_plan_name}
- 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_name} to continue to incorporate pat- dogs if possible'

Capacity Assessment form

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:

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Name and role of person completing this form:

Date:

Nature of decision: (for example, 'consenting to necessary medication', 'consent to the use of bed-rails at night' or 'consenting to be helped with intimate personal care')

Capacity Assessment form

Step 1

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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
<p>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.</p> <p>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'.</p>		

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Capacity Assessment form

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

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If 'No', describe below how you know the person could not remember the information for long enough to use it

Capacity Assessment form

2C. Can the person Use or weigh it to make their decision	Yes	No
<i>If 'No', describe below how you know the person was not able to use or weigh the information</i>		
2D. Can the person Communicate the decision by any means	Yes	No

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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.

Care Planning: Best interests decision-making form

{Service_user_text}'s Name

Nature of decision facing the person

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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
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If **'Yes'**, record how you are encouraging the person to regain capacity.

If **'No'**, continue with best interests decision-making.

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Care Planning: Best interests decision-making form

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
<p>If 'Yes', and the Advance Decision is valid and applicable, this medication cannot be given.</p> <p>If 'No', continue with best interests decision-making.</p>		
2.B Is there any other person with legal powers to make this decision?	Yes	No
<p>If 'Yes': Notify them of the decision, and offer to help them with any relevant information.</p> <p>If 'No', continue with best interests decision-making.</p>		

Care Planning: Best interests decision-making form

Step 3: The best interests check-list		
3A. What are the person's present wishes and feelings about this decision? Do they feel strongly one way or another?	Yes	No

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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: Relatives or friends, 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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Care Planning: Best interests decision-making form

<p>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.</p>	Yes	No
<p>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.</p>	Yes	No
<p>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 (<i>For example, you may have tried them and they do not meet the person’s needs</i>).</p> <p>Record here:</p>	Yes	No
<p>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.</p>	Yes	No
<p>3G. Ensure that the {Care_plan_name} 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_name} based on assessments of capacity and best interests as laid out here.</p>	Yes	No

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Additional Notes:

Care Planning: Best interests decision-making form

Examples of Best Interest Decisions Example

1: Use of bed-rails

On the balance of probabilities, Mr Y lacks the mental capacity, due to his acquired brain injury which affects his memory, to consent to the use of bed-rails to prevent him falling out of bed at night (see capacity assessment for this decision). After several falls, which only occur at night when he is very sleepy, a best interests decision was made that bed-rails are in his best interests, and the least restrictive option to prevent falls at night. See best interests decision-making record.

*This is a restraint under the MCA since it restricts his freedom of movement. This means it must be **necessary to prevent harm** to him and **proportionate** to the likelihood and seriousness of that harm.*

Night staff are to:

- Remind him at bed-time that the rail will be there to prevent him falling out of bed*
- Make sure that the bell-push is in his reach; help him to use his frame to go to the toilet at his request if he wakes*
- Check on him at hourly intervals during the night in case he forgets about the bell-push or it is no longer*

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in is reach

- *Lower the bed-rail in the morning once he is fully awake and make sure his walking frame is within reach*

Example 2: Personal Care:

The completed capacity assessment shows that, on the balance of probabilities, Mrs X lacks 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: the she enjoys these*
- *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 return within half an hour*
- *Recognise that, if they need to hold her arms, this is a restraint: they need to record this in the daily notes. 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*