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|  **Review Sheet** |
| Last Reviewed Last Amended Next Planned Review in 12 months, or02 Jul '20 02 Jul '20 sooner as required. |
| Business impact | Minimal action required circulate information amongst relevant parties.**LOW IMPACT** |
| Reason for this review | Scheduled review |
| Were changes made? | Yes |
| Summary: | This policy details the approach to take in relation to the Mental Capacity Act and its code of practice. It has been reviewed and references have been replaced with updated ones.Reference to the implementation of the Liberty Protection Safeguards (LPS) has been modified to reflect the current position. |
| Relevant legislation: | * The Care Act 2014
* Equality Act 2010
* 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: UK Government, (2016), *The Mental Capacity Act Code of Practice*. [Online] Available from: [https://www.gov.uk/government/publications/mental-capacity-act-code- of-practice](https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice) [Accessed: 2/7/2020]
* Author: The Office of the Public Guardian, (2020), *Guidance and Safeguarding information about LPAs and Deputies*. [Online] Available from: <https://publicguardian.blog.gov.uk/category/guidance/>[Accessed: 2/7/2020]
* Author: Social Care Institute for Excellence, (2020), *Mental Capacity Act (MCA) Directory*. [Online] Available from: <https://www.scie.org.uk/mca-directory/>[Accessed: 2/7/2020]
* Author: HM Government/SCIE, (2020), *Mental Capacity Act (MCA) tailored for social care staff*. [Online] Available from: [https://www.scie.org.uk/mca-directory/mca-tailored- for-you/forsocialcarestaff.asp](https://www.scie.org.uk/mca-directory/mca-tailored-for-you/forsocialcarestaff.asp) [Accessed: 2/7/2020]
 |
| Suggested action: | * Encourage sharing the policy through the use of the QCS App
* Use existing, planned methods for sharing information
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| 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. |

**1. Purpose**

* 1. To meet the provisions of the Mental Capacity Act 2005 (occasionally referred to as 'The Act' in this policy).
	2. To support Holbeach Hospital & Nursing Home 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? |
| EFFECTIVE | E2: How does the service make sure that staff have the skills, knowledge and experience to deliver effective care and support? |
| EFFECTIVE | E7: Is consent to care and treatment always sought in line with legislation and guidance? |
| SAFE | S1: How do systems, processes and practices keep people safe and safeguarded from abuse? |

* 1. To meet the legal requirements of the regulated activities that Holbeach Hospital & Nursing Home is registered to provide:
		+ The Care Act 2014
		+ Equality Act 2010
		+ Human Rights Act 1998
		+ Mental Capacity Act 2005
		+ Mental Capacity Act Code of Practice

**2. Scope**

* 1. The following roles may be affected by this policy:
		+ All workers delivering support or care
	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
	3. The following stakeholders may be affected by this policy:
		+ Advocates
		+ Commissioners
		+ The family and friends of Service Users who might lack mental capacity as defined under the Act in England and Wales

**3. Objectives**

* 1. Staff assume capacity of Service Users until proven otherwise by use of a decision and time specific mental capacity assessment.
	2. Staff empower and protect Service Users who are not able to make their own decisions by use of the Mental Capacity Act Framework. By following the mental capacity code of practice, staff are supported to make decisions in the Service Users' best interests and encouraged to identify the least restrictive of all available options.
	3. Staff are aware of their responsibilities and are legally protected through following the principles of the Mental Capacity Act.

**4. Policy**

* 1. Holbeach Hospital & Nursing Home staff will know and work within the MCA's five mandatory principles at all times where relevant, as detailed within the Forms section of this policy.
	2. Holbeach Hospital & Nursing Home staff will ensure that they support Service Users to make their own decisions at every opportunity by using all available means to enhance their capacity for each specific decision.
	3. When a Service User lacks the mental capacity to make a particular decision, all actions taken will be in the best interests of that person and align as far as possible with the person's wishes and feelings. Staff will ensure that they use the MCA assessment to inform best interest decision making.
	4. Staff will refer to the associated policies and procedures at Holbeach Hospital & Nursing Home, such as restriction of freedom of movement, when considering capacity and best interest decision making and ensure that their actions are in accordance with the MCA.
	5. Staff know that the Mental Capacity Act does not allow a person aged 18 or over to be deprived of their liberty in a care home or hospital, unless the person's rights are protected by the Deprivation of Liberty Safeguards (DoLS). Staff can refer to the Deprivation of Liberty Safeguards (DoLS) Policy and Procedure at Holbeach Hospital & Nursing Home for further details.
	6. In cases where a Service User lacks capacity and has no relative or friend, apart from paid staff, to be consulted about their wishes and feelings, and there is a need for serious medical treatment or a change in accommodation (e.g. moving into a care home) then an independent mental capacity advocate

(IMCA) must be appointed by the relevant NHS body or local authority. Staff of Holbeach Hospital & Nursing Home co-operate with any IMCA who is instructed.

**5. Procedure**

## Responsibilities

The Manager will maintain and raise awareness among all staff of the Mental Capacity Act's principles and practice, including:

* + - The requirement to do everything possible to enable Service Users to make their own decisions
		- The definition of restraint within the MCA, and how to recognise unavoidable deprivation of liberty in the person's best interests
		- The requirement to interfere with the person's basic rights and freedoms as little as possible, while keeping them as safe as possible

It is every member of staff's responsibility to maintain this knowledge and raise any concerns or gaps in knowledge with the Manager.

## Education and Training

* + - All staff at Holbeach Hospital & Nursing Home will be given training (including regular refresher

training) in the Mental Capacity Act and the attendance of staff will be recorded on a matrix at Holbeach Hospital & Nursing Home

* + - New Care Workers new to care will be expected to complete standard 9 of the Skills for Care Certificate
		- Forums such as supervision, team meetings and observation of practice will be used to continue improving staff practice in applying the MCA
	1. Holbeach & East Elloe Hospital Trust will make available to staff, documents and resources about the Act, including training resources. References to resources can be found in the Further Reading and Underpinning Knowledge sections of this policy.

## How Staff can Support Individuals to Make Decisions

Staff must adopt the following best practice in relation to supporting Service Users to make decisions:

* + - Knowing how to present the right information in the right way, including being clear about all the available options
		- Actively looking for the best ways to communicate with a Service User, including checking whether they can see and hear as well as possible, or need an interpreter, or need to have pictures to understand their options
		- Putting the person at ease, choosing the right time of day to explain about a decision to the Service User, or asking whether they would like a relative or friend present
		- Taking care to enable the Service User, wherever possible, to take away the information (in an easy- read format where suitable) and think it over, or discuss it with trusted friends or family
		- Actively trying to create options that will fit with the Service User's wishes, feelings, history and personality

## Assessment of Capacity

Any assessment of a Service User'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 must **never** be a generalised statement that someone lacks mental capacity. It is **never** enough to say that the person lacks mental capacity solely because of a diagnosis (such as dementia), or because someone thinks their decision is unwise, or because of their age, or their appearance.

* 1. 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 there may have been a change in their capacity, or when a Care Plan is being developed or reviewed, or when major decisions need to be made.
	2. When assessing a Service User's capacity, the Service User does not have to prove that they have capacity to make a certain decision. It is up to the person(s) 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.
	3. If it is decided that, on the balance of probabilities, and after all possible help has been given to enable them to do so, 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.

## Record Keeping

Any member of staff responsible for assessing capacity must ensure that all required documentation is complete to evidence that the Mental Capacity Act has been followed. Staff must refer to the documentation that can be located in the Forms section of this policy.

* 1. Care Workers must work to a Care Plan which is clearly based on the assessment of capacity and best interests and is subject to review in accordance with local agreement and the care review policy and procedure at Holbeach Hospital & Nursing Home. All Care Workers know that they can raise with senior staff issues that might show that the Care Plan should be reviewed more urgently.
	2. The records of all assessments must be completed fully, signed by the assessor and dated. Assessments will be kept with the Care Plan so they are readily available and can be revisited when reviewing aspects of the Service User's care.

## Best Interest Decision Making

In making a decision in a Service User's best interests, because they lack capacity to make this decision for themselves, the Mental Capacity Act makes it compulsory to use a checklist covering matters to be considered, except in an emergency. This checklist is located on the bottom of the best interest decision making form held in the Forms section of this policy.

## Dispute Management

If there is a dispute about best interests, staff must ensure that they have followed the mandatory best interests checklist, with the aim of making a decision that is what the Service User would have wanted. The following must be considered:

* + - Family and friends will not always agree about what is in the best interests of a Service User. However, they usually have greater knowledge than care staff of what they would have wanted, and sometimes of what the Service User now wants
		- If staff are the decision-makers, they will need to clearly demonstrate through record-keeping that they have made a decision based on all available evidence and taken into account all conflicting views. They must take particular care to look for the option that is the least restrictive of the Service User's rights
	1. If there is a dispute, staff must do their best to reach an agreed decision about what is in the person’s best interests:
		+ Where it might help, involve an advocate who can represent the Service User and highlight their relevant wishes and feelings
		+ Hold a best interests meeting to identify all the possible options and explore the pros and cons of each, or, if for example, relatives or some professionals cannot attend in person, enable all relevant views to be properly recorded and shared
		+ Consider mediation
		+ As a last resort, apply to the Court of Protection for a ruling (normally undertaken by the relevant Local Authority or NHS Trust when a complex and serious decision is to be made)

**6. Definitions**

## Mental Capacity Act

* + - The Mental Capacity Act 2005, covering England and Wales, lays out a legal framework to protect the rights of 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 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 this person unable to make a particular decision at the time it needs to be made? (See explanation below of how to consider the '4 steps' to work this out)
			* Secondly, is their inability to make the decision BECAUSE OF some impairment of, or disturbance in the functioning of, their mind or brain? (This can be temporary or permanent; there will usually be a diagnosis of what is wrong with the mind or brain, but it is not essential)
		- The person lacks capacity for this decision if there is one or more of the following steps that they CANNOT do:
			* **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)

## 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 make decisions in their best interests (rather than leave this to health or care professionals) 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) though, where these exist, they are still valid for financial and property decisions
		- Staff must be aware of any LPA in place for Service Users in their care; they must 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 never able to refuse consent to life-sustaining treatment
		- Deputies for health and welfare decisions 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 or select an attorney under an LPA. Staff must 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

## 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 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 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
		- If it meets the rules above, and applies to the situation at hand, an advance decision to refuse treatment is just the same as if the person is refusing the treatment with capacity: the treatment cannot be given

## 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 finds out about the person’s wishes, feelings, beliefs and values, and brings 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
		- Care home managers must ensure that, if an IMCA has been instructed and will visit, staff understand the IMCA has a right to see the person alone if they wish and has a right to see relevant records. It is good practice to sort out what notes will be relevant to the decision the IMCA will advise on, to welcome the IMCA as a colleague, and to provide somewhere private for the IMCA to meet with the person if they wish, to read the information and make notes

## 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

## 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 the 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 met:

* + - * The person taking action must reasonably believe that restraint is **necessary to prevent harm to the person lacking capacity**, and
			* The amount or type or restraint must be a **proportionate response to the likelihood and seriousness of that harm**

**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 must 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 Deprivation of Liberty Safeguards (DoLS) Policy and Procedure at Holbeach Hospital & Nursing Home
		- Guidance on the Act is provided in a statutory Code of Practice. Whilst there is no legal duty on anyone to 'comply' with the Code, those working with people who lack mental capacity must follow its guidance or have extremely good reasons for not doing so
		- The Act introduces new criminal offences of ill treatment or neglect of a person who lacks capacity by a paid health or care worker. A person found guilty of such an offence may be liable to imprisonment for a term of up to 5 years

**Key Facts - People affected by the service**

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

* + - The Mental Capacity Act (MCA) protects the rights of 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:

**NICE resources on MCA:** <https://www.nice.org.uk/guidance/ng108> **Mental Capacity (Amendment) Act 2019:** <http://www.legislation.gov.uk/ukpga/2019/18/enacted>

*This contains the new liberty protection safeguards (LPS), which will eventually replace the deprivation of liberty safeguards (DoLS). QCS will provide information on the implementation timetable when this is available.*

**Outstanding Practice**

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

* + - 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 requiring special authorisation through DoLS
		- Current good practice materials, including technology, are available to help people who need support in decision making
		- Service Users with capacity are not prevented from making decisions, even though they may appear to be unwise decisions

**Forms**

The following forms are included as part of this policy:

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| **Title of form** | **When would the form be used?** | **Created by** |
| Essential MCA Information - CR11 | To gather information around legal powers and wishes in place to support Service Users, can be used at the pre-admission stage or as part of ongoing update and review | QCS |
| Capacity Assessment Form - CR11 | In line with the MCA statutory principles, for assessing capacity when a decision needs making and there is doubt about the person's capacity to make this decision | QCS |
| Care Planning: Best interests decision-making form - CR11 | In line with the MCA statutory principles, to evidence the best interests decision-making process and the search for the least restrictive option | QCS |
| Five Principles of the MCA - CR11 | As a reference for understanding the five principles | 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? |

# 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 must 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 learnedof 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 must have a copy of this.**If ‘No’:**If the person has the 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:  |

**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 attorneys have 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 must 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 hairdressing, 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 will tell the OPG as a matter of urgency**
	+ Within the possible limits explained in (4) above, you must 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 to 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 will 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’

**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.

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| **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 signs of****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 must 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 this, 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 mentalcapacity for this decision at this time. |
| **2A.** Can the person **understand** information relating to the decision (suitably expressed, andwithout 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 one of 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:  |

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| **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, laying out all the options and recording the views of the person lacking mental capacity and of those interested in their wellbeing: |

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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 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** |
| 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, and their role:** for example, LPA attorney, relatives, 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 and role 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 makeassumptions about best interests simply on the basis of the person’s age, appearance, condition or behaviour. Circle 'yes' to confirm you have considered this. | **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. Circle 'yes' to confirm that you are not makingassumptions 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; circle 'yes' to confirm you have considered this. Then 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. Circle 'yes' to confirm that youhave carried out this process of weighing. | **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. Circle 'yes' toconfirm that you have ensured that this decision-making has been carried out in accordancewith the MCA. | **Yes** | **No** |
| **Additional Notes:** |

**Best interest decision checklist**

* + 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 basis of 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 (even if they do not have the power to make this particular decision)
		- Any deputy appointed by the Court of Protection to make decisions for the person (even if they do not have the power to make this particular decision)

**Examples of recording Best Interest Decisions in Care Plans 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 bedtime 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 in his 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; she can do this and enjoys it
	+ 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 2) 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

**Mental Capacity Act- Five principles of the MCA**

At the heart of the MCA in terms of concepts and values are the five ‘statutory principles’. Consider the five principles as the benchmark – use them to underpin all acts done and decisions taken in relation to those who lack capacity. In doing so, you will better empower and protect individuals who lack capacity. It is useful to consider the principles chronologically: principles 1 to 3 will support the process before or at the point of determining whether someone lacks capacity. Once you’ve decided that capacity is lacking, use principles 4 and 5 to support the decision-making process.

The five key underpinning principles (Section 1, MCA)

**Principle 1:**

A presumption of capacity. Every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise. This means that you cannot assume that someone cannot make a decision for themselves just because they have a particular medical condition or disability.

**Principle 2:**

Individuals being supported to make their own decisions. A person must be given all practicable help before anyone treats them as not being able to make their own decisions. This means you will make every effort to encourage and support people to make the decision for themselves. If lack of capacity is established, it is still important that you involve the person as far as possible in making decisions.

**Principle 3:**

Unwise decisions. People have the right to make what others might regard as an unwise or eccentric decision. Everyone has their own values, beliefs and preferences which may not be the same as those of other people. You cannot treat them as lacking capacity for that reason.

**Principle 4**:

Best interests. If a person has been assessed as lacking capacity then any action taken, or any decision made for, or on behalf of that person, must be made in his or her best interests.

**Principle 5:**

Less restrictive option. Someone making a decision or acting on behalf of a person who lacks capacity must consider whether it is possible to decide or act in a way that would interfere less with the person’s rights and freedoms of action, or whether there is a need to decide or act at all. In essence, any intervention will be proportional to the particular circumstances of the case.