Title of Document	**Mental Capacity Act**
Name of Department	**Quality Assurance**

What type of document is this?	**Policy**	This sets out instructions for how a particular procedure in Helping Hands is to be routinely carried out	
Which Helping Hands POL/SOP/W.I does this document relate to?	N/A	**Reference number of POL/SOP/W.I**	N/A

Which Operational Priority/Priorities does this document link to?	Governance Framework	Superior Client Care	People, Performance & Culture	

Custodian of document	Quality Director	**Committee/Group responsible for this document**	Governance Committee
Approval date and committee chairperson signature	16.05.2023	**When is its next scheduled review?**	16.05.2023

Who does it apply to?	All Helping Hands staff at the facility / All staff at the facility / All staff working with Clients				
	Does it apply to bank workers?	Yes	**Does it apply to agency staff?**	Yes	**Does it apply to third party contractors?**	No

Purpose of the Policy	To give clarity and understanding to all staff with regards to Mental Capacity

ROLES AND RESPONSIBILITIES

Role	Responsibility
Quality Director	To ensure that the policy is embedded and that the Quality Team monitor Mental Capacity compliance across the company.
Quality Assurance Business Partners	To ensure that all teams adhere to the policy and to support teams where required for further understanding of Mental Capacity. To monitor breaches and action accordingly
All Staff	To adhere to the policy and seek guidance from the Quality team where required

1.0 Introduction

1.1. The Mental Capacity Act 2005 (the Act) came into force in 2007 and provides a legal framework for the care, treatment and support of people aged 16 years and over, in England and Wales, who are unable to make some or all decisions for themselves. Anyone supporting people who lack capacity must have regard to the Mental Capacity Act.

1.2. The Act is accompanied by a statutory Code of Practice which explains how the act will work on a day to day basis and provides guidance to all those working with, or caring for, people who lack capacity. As the code has statutory force, all staff who are employed in health and social care are legally required to 'have regard' to the MCA Code of Practice.

1.3. This policy should be read in conjunction with the Mental Capacity Act Code of Practice which can be accessed via the following link:
https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice

1.4. This policy sets out the responsibilities of all people in a caring role in respect of the Mental Capacity Act 2005 and the accompanying MCA Code of Practice.

2.0 Statutory principles

2.1 The Mental Capacity Act sets out 5 statutory principles:

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

2.2 These principles must be considered and followed in every instance when working with someone who may lack capacity to make a decision or decisions for themselves.

3.0 Definition of lack of capacity

3.1 To lack capacity within the meaning of the Mental Capacity Act 2005, a person must be unable to make a decision because of an impairment or disturbance in the functioning of the mind or brain; that is, the impairment or disturbance must be the reason why the person is unable to make the decision.

3.2 The act sets out two stages to test capacity:

Stage 1 – Diagnostic test - there must be an impairment of, or disturbance in the functioning of, the mind or brain.

Stage 2 – Functional test - there must be an inability to make the decision in question as a result of the impairment of, or disturbance in the functioning of, the mind or brain.

3.3 **Stage 1** – Diagnostic test

3.3.1 Evidence that a person has an impairment of the mind or brain or functioning that affects the way the mind or brain works. Examples include learning disability, dementia, delirium, brain injury etc. Please note that capacity is time specific and decision specific.

3.3.2 It does not matter whether the impairment or disturbance is permanent or temporary.

3.3.3 A lack of capacity cannot be established merely by reference to: A person's age or appearance, or Condition, or An aspect of their behaviour, which might lead others to make unjustified assumptions about the person's capacity

3.4 **Stage 2** – Functional test

3.4.1 A person is unable to make a decision for themselves if they are unable:

- To understand the information relevant to the decision
- To retain that information
- To use or weigh that information as part of the process of making a decision or
- To communicate their decision (whether by talking, using sign language or any other means)

3.4.2 A person is deemed to lack capacity if they are unable to meet one or more of these four steps.

4.0 When to assess capacity

4.1 There should always be the assumption that a person has capacity to make the decision in question.

4.2 However, if there is evidence to suggest that a person may lack capacity, then an assessment of capacity should be carried out and enough information gathered to evidence the outcome as soon as practicably possible. This ensures a person's needs are met appropriately, they are safeguarded against harm and self-neglect and their human rights upheld.

4.3 The Act makes it clear that any judgement about a person's ability to make decisions must be on a decision by decision basis and be time specific.

4.4 The person who assesses an individual's capacity to make a decision will usually be the one proposing or most involved with the decision to be made. This means that different people may be involved in assessing.

4.5 Someone's capacity to make different decisions at different times. For example, if the decision was in relation to health treatment then the appropriate person to assess capacity would be the health professional responsible for the treatment such as a nurse, dentist, or doctor. For more complex decisions, it is likely that more formal assessments of capacity may be required to be completed by a professional.

5.0 Fluctuating capacity

5.1 Some people may at times be able to make their own decisions but have an impairment of the mind or brain which affects their decision making ability at other times. Where there is fluctuating or temporary loss of capacity, an assessment of capacity has to be completed at the time the decision has to be made.

5.2 If it is possible, the decision should be delayed until the person has recovered and regained their capacity to make that specific decision. In emergency medical situations urgent decisions will have to be made and immediate action taken in the person's best interest, for example, cardiac arrest, head injury etc. Even in emergency situations, the person caring should try to communicate with the person and keep them informed of what is happening.

5.3 Where a person has been assessed as not having capacity to make a specific decision, this must be reviewed whenever new decisions need to be made or if there is a likelihood that the person may have regained capacity.

6.0 Assessing lack of capacity

6.1 6.1 A single clear test is used for assessing whether a person lacks capacity to make a particular decision at a particular time; it is a "decision-specific" test.

6.2 6.2 A lack of capacity should not be established merely by reference to a person's age, appearance, or any condition or aspect of a person's behaviour that might lead others to make unjustified assumptions about capacity.

6.3 A person who assesses an individual's capacity to make a decision will usually be the one who is directly concerned with the individual at the time the decision needs to be made. This means that different people may be involved in assessing someone's capacity to make different decisions at different times. More complex decisions will need more formal assessments and a professional opinion on the person's capacity will be necessary.

6.4 A person may have the capacity to make some decisions but not others. Decisions on capacity must relate to a specific issue, for example, a person who cannot understand the financial issues around entering long-term care might still have the capacity to make a choice about whether they want to go into long-term care at all and, if so, which location.

6.5 Care must be taken to ensure that no undue pressure is exerted on the person who lacks capacity by other parties, including carers or family members.

6.6 It is a legal requirement that evidence of a capacity assessment is recorded (MCA assessment template is found within Access Care Planning under the profile of the individual) evidence of how a decision has been reached and should be used to record any decision that is complex, controversial or life changing.

7.0 Recording

7.1 An assessor must demonstrate that they have applied the principles of the Act and followed the Code of Practice when carrying out their assessment.

7.2 It is important to document professional rationale to evidence how the decision has been reached: the person does or does not have capacity.

8.0 MCA timescales

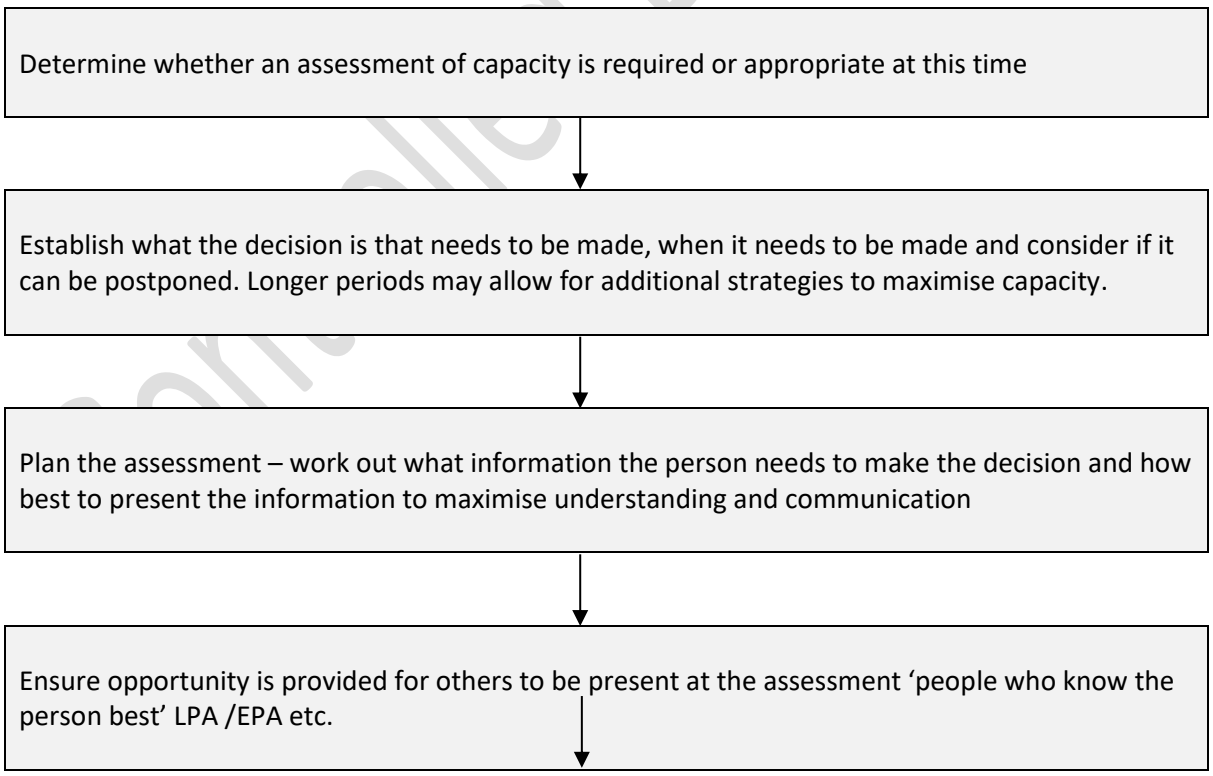
8.1 In cases where there is doubt about an individual's capacity to make decisions around care and support needs, it is important that it is identified as early as possible to determine if it is a lack of capacity or an unwise decision.

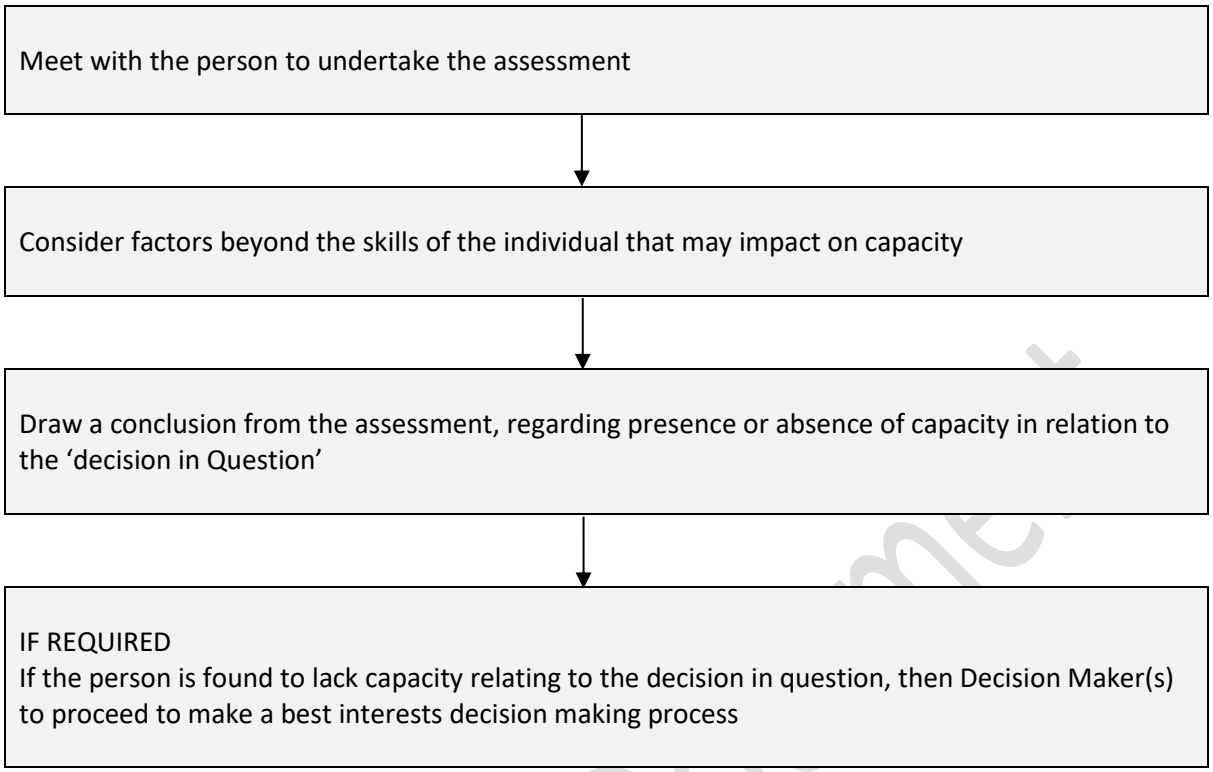
8.2 The law states that the MCA is in place to safeguard the most vulnerable and ensure their needs are met in order for them to remain safe and well. Helping Hands staff have a duty of care to an individual who lacks capacity and must take all reasonable steps to ensure there is no delay in care provision, including safeguarding from harm and putting actions in place in their Best Interests.

8.3 If a Mental Capacity Act assessment cannot be undertaken within appropriate timescales, a communication log note should be added to Access car planning as to the reasons why the assessment cannot be started within the timeframe.

8.4 A Best Interest Meeting must take place as soon as possible following the MCA. Normal practice would be directly following the MCA Assessment has been completed and determined a lack of capacity.

9.0 Process of completing a Mental Capacity Assessment





10.0 Best interests

10.1 The term 'best interests' is not defined by the act. However, one of the key principles underpinning the Act states "if a person has been assessed as lacking capacity, then any action taken or decisions made for, or on behalf of, that person must be made in his or her best interests".

10.2 This principle is relevant for all aspects of any decision that is to be made on behalf of a person who lacks capacity to make that decision (whilst also applying to anyone making a decision on that person's behalf). The exception to this rule is when a person (having previously had capacity) has made an advance decision to refuse medical treatment.

11.0 Best interest meeting

11.1 A best interest meeting is a formal meeting / discussion which involves the decision maker.

11.2 A best interest meeting /discussion must take place as soon as possible after the capacity assessment has established the person has a lack of capacity relating to the decision. This will ensure that the person's needs are met as soon as possible, and their human rights are upheld.

11.3 The best interest meeting should consider where appropriate views / information from relevant professionals, family members and the person who lacks capacity or their representative. If these people are unable to attend the meeting their views must be represented.

11.4 There must be a formal record of the meeting and the decision made using the forms available on Access care planning within the customer's record.

11.5 It is recommended that involvement is requested from the clinical team to ensure professional guidance and advice is sough when a best interest meeting is required.

12.0 Decision-Making principles

12.1 The Act doesn't lay out a process for making decisions, as the scope for decision-making is so wide. It does lay out what needs to be taken into consideration in a best interest checklist:

- The decision must not be made on the basis of the person's age or appearance
- The person's behaviour should not lead to assumptions about what might be in their best interests
- All relevant circumstances need to be considered
- Is the person likely to regain capacity? Can the decision wait?

13.0 Role of the decision maker

13.1 Decision makers are involved in a wide variety of decisions for people who may lack capacity. It is important to identify the correct person and level of decision-making needed at the earliest stage to ensure that the correct people are involved, and safeguards applied.

13.2 The Act gives the power to make a decision to the decision maker. Families often assume that they can make decisions and may be upset and angry if their views are not followed. It is important that families and friends are made aware and understand how and why decisions are made.

13.3 A decision made may not be what family or friends would choose. The decision maker needs to make every effort to resolve disputes about decisions. If it can't be resolved the decision will need to be considered by the Court of Protection and a welfare determination made under section 16 of the Act.

13.4 The decision maker must consider the person's past and present wishes, beliefs and values which would influence their decision making if they had capacity and other factors they would take into consideration if making their own decision.

13.5 The decision maker must, so far as reasonably practicable, permit and encourage the person to participate, or to improve their ability to participate, as fully as possible in any act done for them and any decision affecting them.

13.6 The decision maker must consult and involve others as much as possible. Consultation should ensure that the decision is not restricting the rights of the person lacking capacity

13.7 If the person has no family or friends who can be consulted about a decision they are considered to be 'un-befriended'. If someone lacks capacity to make a significant decision (a change of accommodation or serious medical treatment) and is un-

befriended an Independent Mental Capacity Advocate (IMCA) must be used to provide a view about the person's situation and views. If the decision maker is a medical professional, appropriate referrals must be made and must be compliant with the Mental Capacity Act 2005 is adhered to by the decision maker.

13.8 Where professionals disagree about a decision, the decision maker makes the final decision. There will need to be appropriate discussion of the issues and a clear record of why the decision is made.

14.0 What decisions can be made under MCA?

14.1 The Mental Capacity Act (MCA) can be used to make nearly all decisions for someone who lacks capacity, everything from what to have for lunch, to where to live, to what medical treatment to have, to how to spend money etc.

14.2 There are some decisions which are excluded from the Act, decisions which cannot be made under the best interest process, they include:

- Consenting to marriage or civil partnership
- Consenting to sexual relations
- Consenting to divorce or dissolution of civil partnerships on 2 years separation
- Consenting to a placement of a child for adoption by an adoption agency
- Consenting to the making of an adoption order
- The discharge of parental responsibilities not relating to a child's property
- Consenting to anything under the Human Fertilisation and Embryology Act
- Voting in any election or referendum
- Any actions connected to assisted suicide, manslaughter, or murder.

15.0 Instructing an Independent Mental Capacity Advocate (IMCA)

15.1 When a person lacks capacity and is "un-befriended" and has nobody else who is appropriate and able to represent them or be consulted in the process of working out their best interests, an IMCA should be instructed to provide this support.

15.2 The key functions of an IMCA are:

- Representing and supporting the person who lacks capacity to participate as fully as possible in any relevant decision
- Obtaining and evaluating information
- As far as possible, ascertaining the person's wishes and feelings, and beliefs and values that would be likely to influence the person if they had capacity
- Ascertaining what alternative courses of action are available for the person
- Obtaining a further medical opinion where treatment is proposed and the IMCA considers one should be obtained
- In certain circumstances, can challenge or provide assistance to challenge any relevant decision.

15.3 All Helping Hands locations must have access to the contact details of their local MCA to enable them to refer and liaise with them as and when appropriate.

16.0 Emergency Situations

16.1 In emergency situations, the principles of the Act should always be followed. However, in an emergency, it may not be possible to assess capacity or find out necessary information.

16.2 The Act allows emergency treatment and care to be given. For example, if a person reasonably believes a person lacks capacity and that the proposed treatment is necessary to save their life or to prevent a significant deterioration in their condition the treatment can be given without formal documentation of the capacity assessment and best interest decision.

16.3 The Act does not give any clear indication as to how long it would be acceptable for decisions to be made under the doctrine of necessity. It is sensible to assume that as soon as someone's capacity can be formally assessed and their best interests decided, then this is what should happen.

16.4 In an emergency a person can be conveyed to hospital without their consent and without a full assessment of their capacity. The emergency services will act on a reasonable belief about someone's capacity or act under the common law doctrine of necessities.

17.0 Deprivation of Liberty Safeguards (DoLS)

17.1 The Act was amended in 2009 to include provisions regarding Deprivation of Liberty Safeguards (DoLS) to prevent breaches of the European Convention on Human Rights (ECHR).

17.2 DoLS provide legal protection through a system of assessments and authorisations for people that are or may become deprived of their liberty, within the meaning of Article 5 of the ECHR. The safeguards apply to anyone accommodated in a hospital or care home that has an impairment of the functioning of the mind or brain and is considered to lack the capacity to consent to the arrangements for their accommodation and care and treatment.

17.3 In March 2014 following a high court ruling P v Cheshire West & Chester Council; P & Q v Surrey County Council an "Acid Test" was laid down to determine whether a person is deprived of their liberty:

- Lacks capacity and
- The person is under continuous supervision and Control
- Not free to leave the care home or hospital

17.4 These safeguards ensure that the best interests of the person are considered and that no deprivation of a person's liberty can be authorised except in accordance with the law and the arrangements must be:

- In the person's best interests
- Necessary to protect them from harm

- A proportionate response to the likelihood and seriousness of the harm
- The least restrictive available option for the person.

18.0 Protection for staff providing care or treatment

18.1 The Act provides legal protection from liability for carrying out actions in connection with the care and treatment of people who lack capacity to consent, provided that before taking the action reasonable steps have been taken to establish:

- Whether the person lacks capacity to the matter in question
- When carrying out the act the member of staff reasonably believes the person lacks capacity
- That it would be in their best interests for the act to be done and,
- There is no advance decision prohibiting the act from occurring

18.2 As a result, this means that if a person's capacity and best interests have not been assessed, no legal protection will be available. It is therefore imperative that all acts of decision making are clearly recorded to evidence that the decisions have been correctly reached if the decision was ever challenged.

18.3 This legal protection does not extend to restrictions that cumulatively amount to a deprivation of a person's liberty. Criminal offence of ill-treatment or wilful neglect

18.4 Section 44 of the Act introduced the criminal offence of ill-treatment or wilful neglect of a person who lacks capacity to make relevant decisions. The offence may apply to:

18.4.1 Anyone caring for a person who lacks capacity - this includes family carers, health care and social care staff in hospital or care homes and those providing care in a person's home An attorney appointed under a Lasting Power of Attorney or an Enduring Power of Attorney
Or

18.4.2 A deputy appointed for the person by the court

18.5 A person found guilty of such an offence may be liable to imprisonment for a term of up to five years.

19.0 Restraint

19.1 Section 6 of the Act defines restraint as the use or threat of force where an incapacitated person resists, and any restriction of liberty or movement whether or not the person resists.

19.2 Restraint is only permitted if the person using it reasonably believes it is necessary to prevent harm to the incapacitated person or others, and if the restraint used is proportionate to the likelihood and seriousness of the harm.

19.3 Section 6 allows for the restriction of someone's movement under the Act. It does not allow for depriving someone of their liberty. Restraint using physical force, using seclusion, mechanical restraints or the forcible use of sedating medication is not authorised under section 6 as these may amount to depriving someone of their liberty.

19.4 It is important that in circumstances where a person who lacks capacity is refusing or resisting care or treatment, discussions are held with senior managers to consider how to ensure that appropriate care is delivered

20.0 Lasting Powers of Attorney

20.1 Anyone over the age of 18 who has capacity to make the decision can donate a Lasting Power of Attorney (LPA). This gives someone else the power to make decisions as if they are the person.

20.2 An LPA must be registered with the Office of the Public Guardian (OPG) before it can be used. An unregistered LPA does not give the attorney any legal powers to make a decision for the donor.

20.3 Attorneys acting under an LPA have a legal duty to have regard to the guidance in the MCA Code of Practice and act in the individual's best interests.

20.4 Before the MCA came into force, Enduring Power of Attorneys relating to financial decisions could be made. Any EPAs made before 1st October 2007 remain valid.

20.5 No decision should be based on what an LPA or EPA says without seeing documentation of their power. The Office of the Public Guardian will confirm if someone holds a valid LPA or EPA – by completing an OPG100
https://www.gov.uk/government/publications/search-public-guardian-registers

20.6 A copy of an LAP/EPA or result from an OPG100 Confirming who has LPA/EPA should be uploaded and saved on a customer Access care planning file.

20.7 Concerns that an attorney is not acting in a person's best interests must be discussed with them. If the matter cannot be resolved the Office of the Public Guardian should be notified.

21.0 Role of the Court of Protection and court appointed deputies

21.1 The Court of Protection has jurisdiction relating to the Act and is the final arbiter for capacity matters and has powers to:

- Make declaration about whether or not a person has capacity to make a particular decision
- Make decisions on serious issues about health care and treatment
- Make decisions about the property and financial affairs of a person who lacks capacity
- Appoint deputies to have an ongoing authority to make decisions
- Make decisions in relation to LPAs and EPAs

21.2 Court appointed deputies can be appointed by the Court of Protection for property and affairs and / or personal welfare decisions when a person lacks capacity to make decisions.

21.3 Deputies must have regard to the MCA Code of Practice and act in the person's best interests.

21.4 Anyone can be appointed as a deputy provided that they are suitable and willing to be appointed.

21.5 Deputies are supervised by the Office of the Public Guardian which is the registering authority for LPAs and deputies.

21.6 A Court of Protection Visitor provides independent advice and reports to the Court of Protection and the Office of Public Guardian. There are two types of visitors, General Visitors and Special Visitors (registered medical practitioners with relevant expertise).

22.0 Advance decision to refuse treatment

22.1 An advance decision enables someone aged 18 and over and with capacity to clearly state the medical treatment they would want to refuse and the circumstances in which they would not want treatment should they lack capacity at the time the treatment is required.

22.2 The advance decision does not have to be in writing (although this is advisable) and the care provider should record on the person's record if they are aware of the existence of an advance decision and where this is kept. However Advance decisions in regard to life sustaining treatment and Do Not Attempt to Resuscitate are required to be in writing and witnessed.

22.3 An advance decision to refuse treatment must be valid and applicable to the current circumstances and decisions to be made. A valid advance decision should be treated the same as a decision made by someone with capacity.

22.4 If the advance decision refuses life-sustaining treatment, it must:

- Be in writing
- Be signed and witnessed, and:
- State clearly that the decision should be applied even if life is at risk

22.5 An advance decision may be withdrawn by the person at any time by any means except in the case of life-sustaining treatment where the withdrawal must be in writing.

22.6 If there is doubt or dispute about the existence, validity, or applicability of an advance decision then it should be referred to the Court of Protection for determination.

23.0 Relationship between the Mental Capacity Act (MCA) and the Mental Health Act (MHA)

23.1 In essence the MCA is designed to protect and assist people who lack the necessary capacity to make decisions about their care and treatment. In contrast, the MHA is used to protect people who require treatment for serious mental disorders and are deemed to be of a sufficient risk to themselves or others.#

23.2 It is important to determine which piece of legislation is the most appropriate to use and so a sound understanding and application of the principles and provisions of the

Mental Health Act, Mental Capacity Act and the Deprivation of Liberty Safeguards to safeguard rights under the European Convention on Human Rights (ECHR).

24.0 Safeguarding

24.1 People who may lack the capacity to make certain decisions may also be less able to protect themselves from abuse or exploitation and therefore be considered an adult at risk.

24.2 If you have any concerns that an adult at risk may be experiencing abuse, follow the safeguarding procedures.

TRAINING

Is training required?	Yes
Details of training	Training will be delivered via the Learning Management System and additional knowledge and understanding will be supported by the Quality Assurance Business Partners

COMPLIANCE

How is compliance with the POL going to be monitored	This policy will be monitored by the Quality team. Should there be changes within regulation or legislation this policy will be reviewed. Breach of policy will be monitored by internal reporting and Quality Assurance Business Partners

EQUALITY IMPACT ASSESSMENT AND PROCEDURAL INFORMATION

	Yes / No	Comments
Does the document have a positive or negative impact on one group of people over another on the basis of their:		
• age?	NA	
• disability?	NA	
• gender reassignment?	NA	
• pregnancy and maternity (which includes breastfeeding)?	NA	
• race (including nationality, ethnic or national origins or colour)?	NA	
• marriage or civil partnership?	NA	
• religion or belief?	NA	
• sex?	NA	
• sexual orientation?	NA	
If you have identified any potential impact (including any positive impact which may result in more favourable treatment for one particular group of people over another), are any exceptions valid, legal and/or justifiable?		The policy gives a positive approach to the company Mental Capacity Act requirements, and does not negatively impact any group
If the impact on one of the above groups is likely to be negative:		
• Can the impact be avoided?	NA	
• What alternatives are there to achieving the document's aim without the impact?	NA	
• Can the impact be reduced by taking different action?	NA	

• Is there an impact on staff, client or someone else's privacy?	NA	

What was the previous version number of this document?	02	
Changes since previous version	Update and review of content	
Author of the document	Quality Manager	
Who was involved in developing/reviewing /amending the POL?	Quality Manager	
How confidential is this document?	Public	Can be shared freely within and outside of Helping Hands
References	Mental Capacity Act 2018 (updated 2019)	
Associated Documents	Consent to Care Work Instruction HHH-W.I-040	