

# THE MENTAL CAPACITY ACT 2005 & COVID-19 TESTING



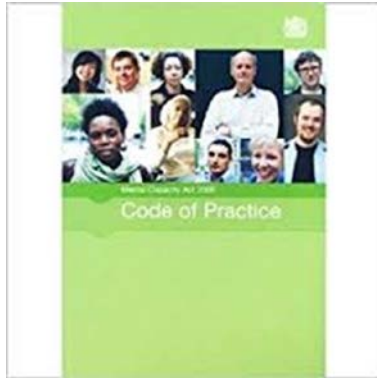
MAY 2020



Mental Capacity Act 2005



# DOWNLOAD THE MCA CODE OF PRACTICE



CODE OF PRACTICE:

[www.gov.uk/government/publications/mental-capacity-act-code-of-practice](http://www.gov.uk/government/publications/mental-capacity-act-code-of-practice)



# HUMAN RIGHTS

- Human Rights are the bedrock of UK legislation
- Interventions need to be HR Compatible
- <https://www.youtube.com/watch?v=BOc-fpC1bak>





# MCA -WHAT WHY HOW??

An assessment which considers whether a person has the mental capacity to make a decision around healthcare, social care or finances.

- When a person is not able to give or refuse consent to care or treatment or to make other decisions the assessment of capacity provides a gateway to using the MCA and making a decision in their best interests.

# The Principles



- **Principle 1:** ‘A person must be assumed to have capacity unless it is established that he lacks capacity.’ (section 1(2)) ([Page 20 Code of Practice](#))
- **Principle 2:** ‘A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.’ (section 1(3)) ([Page 22 Code of Practice](#))
- **Principle 3:** ‘A person is not to be treated as unable to make a decision merely because he makes an unwise decision.’ (section 1(4)) ([Page 24 Code of Practice](#))
- **Principle 4:** ‘An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.’ (section 1(5)) ([Page 26 Code of Practice](#))
- **Principle 5:** ‘Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.’ (section 1(6)) ([Page 27 Code of Practice](#))

# Legal Criteria:



- Person being assessed is **aged 16 or over** & has an **impairment** (**dementia, LD, Acquired Brain Injury**) of **or disturbance** (**intoxicated, confusion due to infection etc**) in the mind or functioning of the brain.
- The MCA assessment is **time and task** specific
- To have mental capacity the person must be able to **understand** information specific to the decision, **retain** during the decision making process, **use or weigh** up the information and **communicate** their decision.
- **If the person is able to do all four above, they have the mental capacity to refuse / consent to care or treatment or other decisions. Even if this is unwise!**
- If a person can not do one or more of the four stage assessment **BECAUSE** of an impairment or disturbance in the functioning of the mind or brain they lack mental capacity for that decision at that time.

# WHEN WOULD YOU ASSESS CAPACITY?

- When you have **reasonable belief** to question someone's decision making ability





# MCA DURING COVID-19



- There are **NO** statutory easements to the MCA
- MCA or any restrictive practice cannot be used to prevent harm to others
- A decision specific Mental Capacity assessment should be completed for any person where capacity is questioned.
- Where capacity is assumed, it should be documented as such on the person's record.
- **Please read SWABBING GUIDANCE [HERE](#)**



# What do I need to do to assess Capacity for the COVID-19 Testing?

- Does the person understand the information pertaining to the test? **Salient details!!!!**
- Consider using easy reads and pictorial aids: [GOV.UK COVID EASY READ](#) [EASY READ HAVING SWABS TAKEN](#) [PICTORIAL](#)
- Can the person retain the information for the period of time required to consent to the interventions being proposed?
- Can the person use and weigh the information up to know the interventions are to ensure they are cared for safely, and receive appropriate treatment
- Can the person communicate their consent to the decision? (Not always verbal means)



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# What do I need to do to assess capacity for the testing?

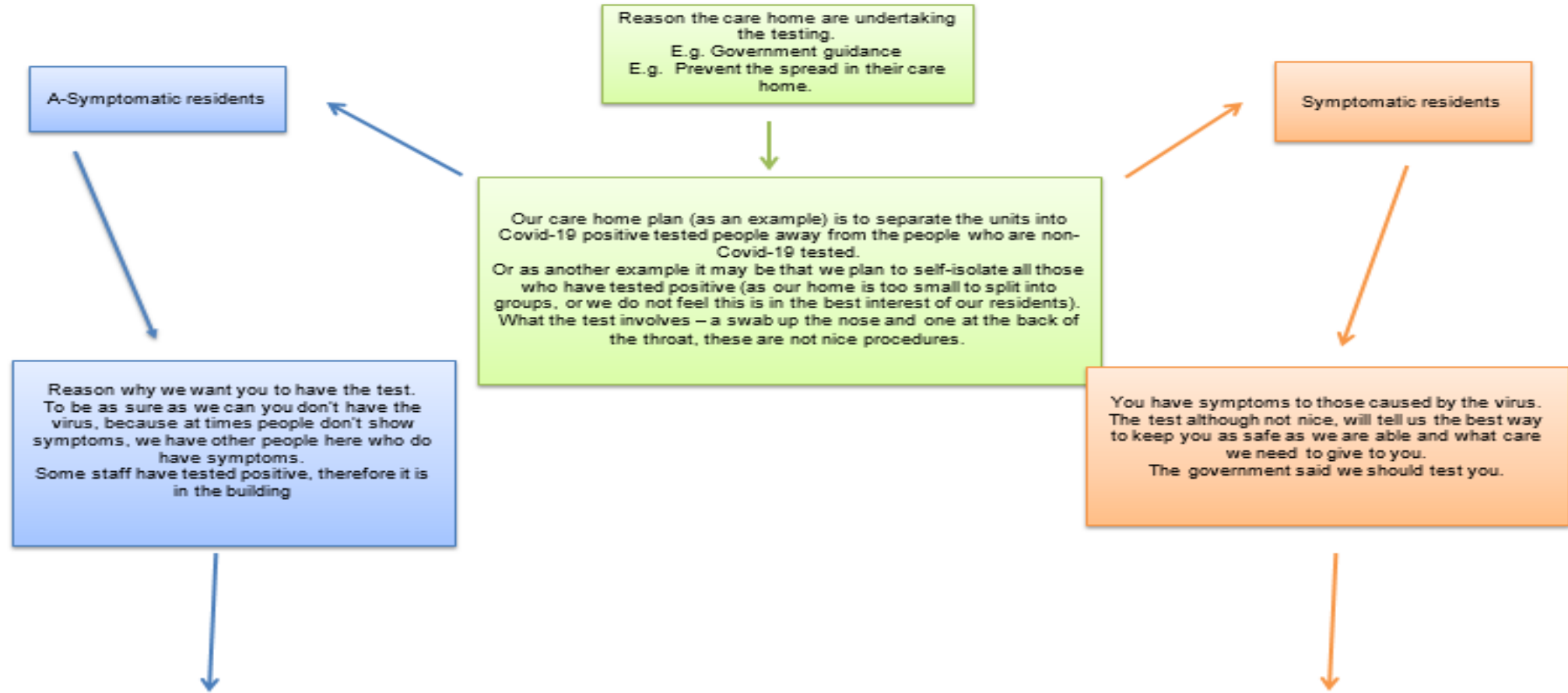
- Broadly speaking, the assessor needs to provide information on:
- The nature of the decision (what?)
- The purpose for which it is needed (why?)
- The reasonably foreseeable consequences of making or not making the decision (the risks or positive outcomes)

# WHAT? .... SALIENT INFORMATION

- The benefits of having a swab including known clinical advantages based on timescales and
- symptoms of the person's individual presentations and circumstances.
- The consequences of a positive diagnosis, including the 14 day self-isolation period.
- The residency and care options available both if tested or not tested
- The impact of the invasiveness of the procedure
- Any restrictions being proposed or would be required and the timescale to implement them to enable completion of the procedure. These may include environmental (confined to certain areas), mechanical (bed rails or other equipment that restrict movements), physical (restraint in the form of redirection), pharmaceutical (use of medication)



## Process of Testing for Covid-19



Although you do not have symptoms, other people in the building do have them.

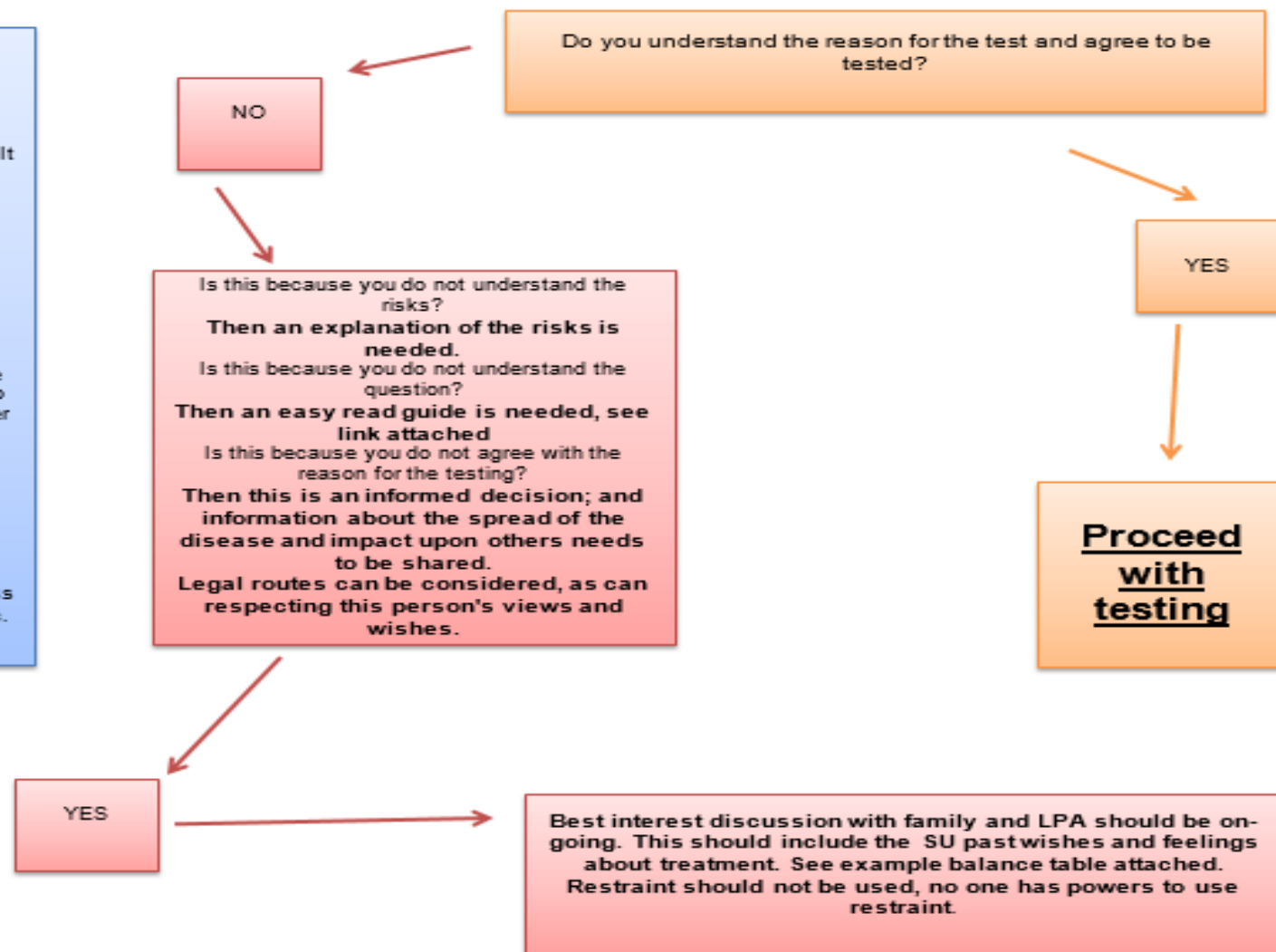
The test although not nice, will tell us the best way to keep you safe and help reduce the risk. It will help us to know what care we need to provide to you to maintain your well-being.

We as a care home have decided the best way forward is to keep all those people with symptoms

- A) On one unit, or in their own room, for two weeks as directed by current guidelines.
- B) In their own room for the majority of the day, with breaks for all meals, to go into the garden alone or with others, or other creative ideas to ensure people have time away from their room

Those people who do not want to have the testing; and this is your right, you will be asked to remain in your room and self-isolate.

We as a care home have provided a time table for going outside, to use the dining room, access the garden, use the I-Pad to speak to family etc.



# CONSENT

- Don't **confuse consultation** with families with **consent**.
- Families may be consulted with but this is not the same as consent
- Remember only those **with Legal Authority can consent for another adult** (LPA / DEPUTYSHIP) if within the scope of their role ie: **Personal Welfare** and not Property & Affairs **and** where the person lacks capacity to make this decision.
- People often assume decision making 'power' with no legal standing eg: confusing Appointeeship for benefits with LPA

# Lasting Power of Attorney and Deputyship

- **Is there a valid LPA or Deputy for Personal Welfare?**
- **If so – they will be the Decision Maker**



Office of the  
Public Guardian

**Lancashire**

County  
Council



# BEST INTERESTS: PRINCIPLE 4

‘An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.’ (section 1(5))



# BEST INTEREST CHECKLIST

## BEST INTEREST CHECKLIST

Encourage participation

Identify relevant circumstances

Find out the persons views

Avoid discrimination (don't make assumptions based on appearance, age, diagnosis etc)

Assess whether the person may regain capacity

Consult others

If the decision is relating to life sustaining treatment, not be motivated to bring about the persons death.



# BEST INTERESTS

- Use the checklist - available options, any restrictions being proposed, and why less restrictive options cannot be utilised.
- A balance chart should be **evidencing why the test is in the person's best interests**, how effective it will be (based on symptoms and timescale of presenting symptoms) and any outcomes that will be of benefit to the person
- Consultation with others – this **does not** have to be a formal meeting

# ADVOCACY

Is the person un-befriended – do they require advocacy involvement?

**Advocacy Focus** have confirmed that they are following the 39 Essex St guidance dated 04.05.2020

<https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/Mental-Capacity-Guidance-Note-COVID-19-testing-and-capacity-4-May.pdf>

Contact details for Advocacy Focus for referrals in the LCC area **0300 323 0965** and email: [admin@advocacyfocus.org.uk](mailto:admin@advocacyfocus.org.uk)

Providers should consider making a referral for an IMCA where:

- There are potentially serious consequences of testing;
- Decisions for and against are finely balanced;
- P might need restraint to undergo the test;
- P may object to the test;
- There are any other contentious issues.

# BENEFITS & BURDENS

- Importance of using this approach
- Seeks to uphold the persons rights
- Provides a suitable platform for defensible decision making
- Reduces likelihood of arbitrary decisions
- Makes us consider each option in terms of necessary and proportionate – whether it is the least restrictive option available

# EXAMPLE BENEFITS & BURDENS TABLE

**Option 1 - Benefits to the person of enacting the decision:**

Testing is going to take in place.

- The test itself although invasive is undertaken quickly \*\*\*
- Being tested for Covid-19 will provide peace of mind to P \*\*
- Being tested for Covid-19 will enable care staff to provide the safest care to prevent the spread of the virus and more importantly for P reduce the potential for physical deterioration \*\*\*
- If a Negative test result - P will no longer need to be kept isolated from others who have also negatively tested in the same care setting. Thus increasing social interaction opportunities \*\*\*
- If moved to a positive tested area of the building, P will be closely observed by staff who will remain vigilant of any changes or presenting symptoms of the virus in P \*\*\*

**Option 1 - Burdens or risks to the person of enacting the decision:**

Testing is not going to take place.

- By not being tested for Covid-19 could cause P to be more distressed (fearing the worse) \*\*
- By not being tested for Covid-19 P in line with guidance P will be treated as if they have tested positive; and separated in their room or a Covid area of the building \*\*\*
- Being separated into an active Covid-19 area increased P risk of contracting the virus \*\*\*
- P will be nursed in the bedroom, or possibly separated (from friends in the home) causing distress \*\*



# Restrictive Practices & Restraint

## Restrictive Practices

'Making someone do something they don't want to do or stopping someone doing something they want to do' (*Skills for Care: A positive and proactive workforce*)

- Can be obvious or subtle, planned in advance or in an emergency
- 4 main areas when restrictive practices are used: blanket rules, health & safety, care & treatment, challenging behaviour

## Restraint

'Someone is using restraint if they use force – or threaten to use force – to make someone do something that they are resisting, or restrict a person's freedom of movement, whether they are resisting or not' (*Mental Capacity Act Section 6.4*)

# USING RESTRAINT

- Restraint should not be used to undertake the testing process
- If the person is resisting the process, consider explaining the purposes again, using the pictorial / easy read information etc
- If the person continues to resist or object to the process it must stop
- Consideration will be required for the other available options ie: treating the person as if they had tested positive or seeking legal advice

# RESTRAINT CONT:

[ESSEX CHAMBERS](#) suggest that it is likely to be unlawful to use force to bring about testing in most situations absent recourse to court. The Coronavirus Act 2020 specifically envisages the use of reasonable force in relation to the operation of powers under Schedule 21, but only by a constable or immigration officer in the exercise of a power conferred by the Schedule and a constable or immigration officer cannot carry out testing or obtain a biological sample. Whilst a constable or immigration officer could be present at or outside the testing room to ensure the individual does not abscond from the room, it is difficult to see how they could themselves lawfully deploy reasonable force to bring about the testing itself.



# MCA AND TESTING INFORMATION:

- Gov.uk and COVID-19 Testing: <https://www.gov.uk/guidance/coronavirus-covid-19-getting-tested>
- Gov.UK MCA & DoLS Guidance: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/878910/Emergency\\_MCA\\_DoLS\\_Guidance\\_COVID19.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878910/Emergency_MCA_DoLS_Guidance_COVID19.pdf)
- Gov.uk COVID-19 & MCA Including Best Interests: <https://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity/the-mental-capacity-act-2005-mca-and-deprivation-of-liberty-safeguards-dols-during-the-coronavirus-covid-19-pandemic-additional-guidance>
- Essex Chambers MCA and Testing Guidance: <https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/Mental-Capacity-Guidance-Note-COVID-19-testing-and-capacity-4-May.pdf>
- Healthier Lancashire Swabbing and MCA Guidance: <https://www.lancashire.gov.uk/media/917255/200522-swabbing-advice.pdf>
- MCA Code of Practice <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>
- Gov.uk MCA Guidance Easy Read: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/888422/emergency-mca-guidance-covid-19-easy-read.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888422/emergency-mca-guidance-covid-19-easy-read.pdf)
- Easy Read Having Swabs Taken: <http://flipbooks.leedsth.nhs.uk/LN004794.pdf>

# MCA GENERAL INFORMATION

## USEFUL LINKS:

- MCA CODE OF PRACTICE: <https://www.gov.uk/.../mental-capacity-act-code-of-practice>
- LANCASHIRE SAFEGUARDING ADULTS BOARD....Lots of resources on here, well worth a look.: <http://www.lancshiresafeguarding.org.uk/lancashire-safeguarding-adults/policies-and-procedures.aspx>
- ESSEX CHAMBERS (CASE LAW UPDATES) brilliant for easy read summaries. Has a key word search which is useful.: [www.39essex.com](http://www.39essex.com) Resource section: <https://www.39essex.com/resources-and-training/mental-capacity-law/>
- ADVOCACY FOCUS (LOTS OF EASY READ INFORMATION YOU MAY FIND USEFUL):: <https://www.advocacyfocus.org.uk/justiceforlb>
- SCIE REPORT: <https://www.scie.org.uk/files/mca/practice/care-planning/mca-and-care-planning-report.pdf>
- LANCASHIRE SELF NEGLECT FRAMEWORK LINK... framework launch was 20.03.19 so still very new:: <http://www.lancshiresafeguarding.org.uk/lancashire-safeguarding-adults/what-is-safeguarding-and-abuse/self-neglect.aspx>
- OPG LINK RE LPA STUFF & OPG 100 FORMS... OPG have recently updated some of their forms:: <https://www.gov.uk/government/publications/search-public-guardian-registers> <https://www.lastingpowerofattorney.service.gov.uk/home>

# USEFUL LINKS CONT.....

- EDGE TRAINING & CONSULTANCY – GOOD RANGE OF MCA & LPS INFORMATION: <http://www.edgetraining.org.uk/>
- CQC INFO WHEN MCA NOT COMPLIED WITH:: <https://www.communitycare.co.uk/2010/06/17/professionals-fail-to-comply-with-mental-capacity-act/> <https://www.cqc.org.uk/guidance-providers>
- LANCASHIRE SELF NEGLECT FRAMEWORK LINK... framework launch was 20.03.19 so still very new:: <http://www.lancshiresafeguarding.org.uk/lancashire-safeguarding-adults/what-is-safeguarding-and-abuse/self-neglect.aspx>
- OPG LINK RE LPA STUFF & OPG 100 FORMS... OPG have recently updated some of their forms:: <https://www.gov.uk/government/publications/search-public-guardian-registers>  
<https://www.lastingpowerofattorney.service.gov.uk/home>