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HARINGEY ADULTS MENTAL CAPACITY PRACTITIONER MANUAL

BETTER OUTCOMES BETTER LIVES

HARINGEY COUNCIL | River Park House, 225 High Road, Wood Green, N22 8HQ
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Mental Capacity Practitioner Manual

1. Introduction

The Mental Capacity Act 2005 (the Act) provides the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves. Everyone working with and/or caring for an adult who may lack capacity to make specific decisions must comply with the Act when making decisions or acting for that person, when the person lacks the capacity to make a particular decision for themselves. The same rules apply whether the decisions are life-changing events or everyday matters.

The Act's starting point is to confirm in legislation that it should be assumed that an adult (aged 16 or over) has full legal capacity to make decisions for themselves (the right to autonomy) unless it can be shown that they lack capacity to make a decision for themselves at the time the decision needs to be made. This is known as the presumption of capacity. The Act also states that people must be given all appropriate help and support to enable them to make their own decisions or to maximise their participation in any decision-making process.

The underlying philosophy of the Act is to ensure that any decision made, or action taken, on behalf of someone who lacks the capacity to make the decision or act for themselves is made in their best interests.

The Act is intended to assist and support people who may lack capacity and to discourage anyone who is involved in caring for someone who lacks capacity from being overly restrictive or controlling. However, the Act also aims to balance an individual's right to make decisions for themselves with their right to be protected from harm if they lack capacity to make decisions to protect themselves.

Important note:

This manual provides an overview of some of the key areas of the Mental Capacity Act that will support workers in undertaking their role. However, this manual does not cover all areas nor is it extensive in the areas it does cover. It is therefore advised that practitioners utilise the Mental Capacity Act Codes of Practice especially in cases of complexity and risk.

2. Principles of the Mental Capacity Act

The five statutory principles are the fundamental pillars to act and must always be central to any questions relating to capacity and best interest. They are:

1. A person must be assumed to have capacity unless it is established that they lack capacity.
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.
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 this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
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.

Principle 1: *'A person must be assumed to have capacity unless it is established that he lacks capacity.'*

This principle states that every adult has the right to make their own decisions – unless there is proof that they lack the capacity to make a particular decision when it needs to be made. This has been a fundamental principle of the common law for many years.

It is important to balance people's right to make a decision with their right to safety and protection when they cannot make decisions to protect themselves. However, the starting assumption must always be that an individual has the capacity, until there is proof that they do not.

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.'*

It is important to do everything practical to help a person make a decision for themselves before concluding that they lack capacity to do so. People with an illness or disability affecting their ability to make a decision should receive support to help them make as many decisions as they can. This principle aims to stop people being automatically labelled as lacking capacity to make particular decisions. Because it encourages individuals to play as big a role as possible in decision-making, it also helps prevent unnecessary interventions in their lives.

The kind of support people might need to help them make a decision varies. It depends on personal circumstances, the kind of decision that has to be made and the time available to make the decision. It might include:

- Using a different form of communication (for example, non-verbal communication)
- Providing information in a more accessible form (photographs, drawings, or tapes)
- Treating a medical condition which may be affecting the person's capacity or
- Having a structured programme to improve a person's capacity to make particular decisions (for example, helping a person with learning disabilities to learn new skills).

Principle 3: *'A person is not to be treated as unable to make a decision merely because he makes an unwise decision.'*

Everybody has their own values, beliefs, preferences and attitudes. A person should not be assumed to lack the capacity to make a decision just because other people think their decision

is unwise. This applies even if family members, friends or healthcare or social care staff are unhappy with a decision.

There may be cause for concern if somebody:

- Repeatedly makes unwise decisions that put them at significant risk of harm or exploitation

or

- Makes a particular unwise decision that is obviously irrational or out of character.

These things do not necessarily mean that somebody lacks capacity. But there might be need for further investigation, taking into account the person's past decisions and choices. For example, have they developed a medical condition or disorder that is affecting their capacity to make particular decisions? Are they easily influenced by undue pressure? Or do they need more information to help them understand the consequences of the decision they are making?

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.'*

The principle of acting or making a decision in the best interests of a person who lacks capacity to make the decision in question is a well-established principle in the common law. This principle is now set out in the Act, so that a person's best interests must be the basis for all decisions made and actions carried out on their behalf in situations where they lack capacity to make those particular decisions for themselves. The only exceptions to this are around research and advance decisions to refuse treatment where other safeguards apply.

It is impossible to give a single description of what 'best interests' are, because they depend on individual circumstances. However, section 4 of the Act sets out a checklist of steps to follow in order to determine what is in the best interests of a person who lacks capacity to make the decision in question each time someone acts or makes a decision on that person's behalf.

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.'*

Before somebody makes a decision or acts on behalf of a person who lacks capacity to make that decision or consent to the act, they must always question if they can do something else that would interfere less with the person's basic rights and freedoms. This is called finding the 'less restrictive alternative'. It includes considering whether there is a need to act or make a decision at all.

Where there is more than one option, it is important to explore ways that would be less restrictive or allow the most freedom for a person who lacks capacity to make the decision in question. However, the final decision must always allow the original purpose of the decision or act to be achieved.

Any decision or action must still be in the best interests of the person who lacks capacity. So sometimes it may be necessary to choose an option that is not the least restrictive alternative if that option is in the person's best interests. In practice, the process of choosing a less restrictive option and deciding what is in the person's best interests will be combined. However, both principles must be applied each time a decision or action may be taken on behalf of a person who lacks capacity to make the relevant decision.

3. How can someone be helped to make a decision?

There are several ways in which people can be helped and supported to enable them to make a decision for themselves. These will vary depending on the decision to be made, the time-scale for making the decision and the individual circumstances of the person making it.

The Act applies to a wide range of people with different conditions that may affect their capacity to make particular decisions. Therefore, the appropriate steps to take will depend on:

- A person's individual circumstances (for example, somebody with learning difficulties may need a different approach to somebody with dementia)
- The decision the person has to make and
- The length of time they have to make it.

Significant, one-off decisions (such as moving house) will require different considerations from day-to-day decisions about a person's care and welfare. However, the same general processes should apply to each decision.

All practical and appropriate steps must be taken by you as the practitioner to help the person to make a decision for themselves. Information must be tailored to an individual's needs and abilities. It must also be in the easiest and most appropriate form of communication for the person concerned.

What information is relevant?

The Act does not state exactly what information will be relevant in each case. Anyone helping someone to make a decision for themselves should therefore follow these steps.

- Take time to explain anything that might help the person make a decision. It is important that they have access to all the information they need to make an informed decision
- Try not to give more detail than the person needs – this might confuse them. In some cases, a simple, broad explanation will be enough but it must not miss out important information.
- What are the risks and benefits? Describe any foreseeable consequences of making the decision, and of not making any decision at all.
- Explain the effects the decision might have on the person and those close to them – including the people involved in their care.
- If they have a choice, give them the same information in a balanced way for all the options.

- For some types of decisions, it may be important to give access to advice from elsewhere. This may be independent or specialist advice (for example, from a medical practitioner or a financial or legal adviser). It might simply be advice from trusted friends or relatives.

Communication – general guidance

To help someone make a decision for themselves, all possible and appropriate means of communication should be tried.

- Ask people who know the person well about the best form of communication (try speaking to family members, carers, community hub staff or support workers). They may also know somebody the person can communicate with easily, or the time when it is best to communicate with them.
- Use simple language. Where appropriate, use pictures, objects or illustrations to demonstrate ideas.
- Speak at the right volume and speed, with appropriate words and sentence structure. It may be helpful to pause to check understanding or show that a choice is available.
- Break down difficult information into smaller points that are easy to understand. Allow the person time to consider and understand each point before continuing.
- It may be necessary to repeat information or go back over a point several times.
- Is help available from people the person trusts? If so, make sure the person's right to confidentiality is respected.
- Be aware of cultural, ethnic or religious factors that shape a person's way of thinking, behaviour or communication.
- Where needed, ensure the use of an interpreter. Even if a person has communicated in English, they may have lost some verbal skills (for example, because of dementia). They may

now prefer to communicate in their first language. It is more appropriate to use a professional interpreter rather than to use family members.

- If using pictures to help communication, make sure they are relevant and the person can understand them easily. For example, a red bus may represent a form of transport to one person but a day trip to another.
- Would an advocate (someone who can support and represent the person) improve communication in the current situation?

Helping people with specific communication or cognitive problems

Where people have specific communication or cognitive problems, the following steps can help:

- Find out how the person is used to communicating. Do they use picture boards or Makaton? Or do they have a way of communicating that is only known to those close to them?
- If the person has hearing difficulties, use their preferred method of communication (for example, visual aids, written messages or sign language). Where needed, use a qualified interpreter.
- Are mechanical devices such as voice synthesisers, keyboards or other computer equipment available to help?
- If the person does not use verbal communication skills, allow more time to learn how to communicate effectively.
- For people who use non-verbal methods of communication, their behaviour (in particular, changes in behaviour) can provide indications of their feelings.
- Some people may prefer to use non-verbal means of communication and can communicate most effectively in written form using computers or other communication technologies. This can be particularly true for those with autistic spectrum disorders.

- For people with specific communication difficulties, consider other types of professional help (for example, a speech and language therapist).

What steps should be taken to put a person at ease?

To help put someone at ease and so improve their ability to make a decision, careful consideration should be given to both location and timing.

Location

In terms of location, consider the following:

- Where possible, choose a location where the person feels most at ease. For example, people are usually more comfortable in their own home than an unfamiliar environment.
- Would the person find it easier to make their decision in a relevant location? For example, could you help them decide about medical treatment by taking them to hospital to see what is involved?
- Choose a quiet location where you will not be disturbed.
- Try to eliminate any background noise or distractions (for example, the television or radio, or people talking).
- Choose a location where the person's privacy and dignity can be properly respected.

Timing

In terms of timing, consider the following:

- Try to choose the time of day when the person is most alert – some people are better in the mornings, others are more lively in the afternoon or early evening. It may be necessary to try several times before a decision can be made.

- If the person's capacity is likely to improve in the foreseeable future, wait until it has done so – if practical and appropriate. For example, this might be the case after treatment for depression or a psychotic episode. Obviously, this may not be practical and appropriate if the decision is urgent.
- Some medication could affect a person's capacity (for example, medication which causes drowsiness or affects memory). Can the decision be delayed until side effects have subsided?
- Take one decision at a time – be careful to avoid making the person tired or confused.
- Don't rush – allow the person time to think things over or ask for clarification, where that is possible and appropriate.
- Avoid or challenge time limits that are unnecessary if the decision is not urgent. Delaying the decision may enable further steps to be taken to assist people to make the decision for themselves.

Support from other people

In some circumstances, individuals will be more comfortable making decisions when someone else is there to support them.

- Might the person benefit from having another person present? Sometimes having a relative or friend nearby can provide helpful support and reduce anxiety. However, some people might find this intrusive, and it could increase their anxiety or affect their ability to make a free choice. Find ways of getting the person's views on this, for example, by watching their behaviour towards other people.
- Always respect a person's right to confidentiality.

What other ways are there to enable decision-making?

There are other ways to help someone make a decision for themselves.

- Many people find it helpful to talk things over with people they trust – or people who have been in a similar situation or faced similar dilemmas.
- If someone is very distressed (for example, following a death of someone close) or where there are long-standing problems that affect someone's ability to understand an issue, it may be possible to delay a decision so that the person can have psychological therapy, if needed.
- Some organisations have produced materials to help people who need support to make decisions and for those who support them. Some of this material is designed to help people with specific conditions, such as Alzheimer's disease or profound learning disability.
- It may be important to provide access to technology. For example, some people who appear not to communicate well verbally can do so very well using computers.

4. How does the Act define a person's capacity to make a decision and how should capacity be assessed?

What does the Act mean by 'lack of capacity'?

Section 2(1) of the Act states:

'For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'

This means that a person lacks capacity if:

- They have an impairment or disturbance (for example, a disability, condition or trauma) that affects the way their mind or brain works, and
- The impairment or disturbance means that they are unable to make a specific decision at the time it needs to be made. An assessment of a person's capacity must be based on their ability to make a specific decision at the time it needs to be made, and not their ability to make decisions in general.

Section 2(2) states that the impairment or disturbance does not have to be permanent. A person can lack capacity to make a decision at the time it needs to be made even if:

- The loss of capacity is partial
- The loss of capacity is temporary
- Their capacity changes over time.

A person may also lack capacity to make a decision about one issue but not about others.

The Act generally applies to people who are aged 16 or older.

What safeguards does the Act provide around assessing someone's capacity?

An assessment that a person lacks capacity to make a decision must never be based simply on:

- Their age
- Their appearance
- Assumptions about their condition, or
- Any aspect of their behaviour.

The Act deliberately uses the word 'appearance', because it covers all aspects of the way people look. So for example, it includes the physical characteristics of certain conditions (for

example, scars, features linked to Down's syndrome or muscle spasms caused by cerebral palsy) as well as aspects of appearance like skin colour, tattoos and body piercings, or the way people dress (including religious dress).

The word 'condition' is also wide-ranging. It includes physical disabilities, learning difficulties and disabilities, illness related to age, and temporary conditions (for example, drunkenness or unconsciousness). Aspects of behaviour might include extrovert (for example, shouting or gesticulating) and withdrawn behaviour (for example, talking to yourself or avoiding eye contact).

What proof of lack of capacity does the Act require?

Anybody who claims that an individual lacks capacity should be able to provide proof. They need to be able to show, on the balance of probabilities, that the individual lacks capacity to make a particular decision, at the time it needs to be made. This means being able to show that it is more likely than not that the person lacks capacity to make the decision in question.

What is the test of capacity?

To help determine if a person lacks capacity to make particular decisions, the Act sets out a two-stage test of capacity.

Stage 1: Does the person have an impairment of, or a disturbance in the functioning of, their mind or brain?

Stage 1 requires proof that the person has an impairment of the mind or brain, or some sort of disturbance that affects the way their mind or brain works. If a person does not have such an impairment or disturbance of the mind or brain, they will not lack capacity under the Act.

Examples of an impairment or disturbance in the functioning of the mind or brain may include the following:

- Conditions associated with some forms of mental illness

- Dementia
- Learning disabilities
- The long-term effects of brain damage
- Physical or medical conditions that cause confusion, drowsiness or loss of consciousness
- Delirium
- Concussion following a head injury, and
- The symptoms of alcohol or drug use.

Stage 2: Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?

For a person to lack capacity to make a decision, the Act says their impairment or disturbance must affect their ability to make the specific decision when they need to. However, people must first be given all practical and appropriate support to help them make the decision for themselves. Stage 2 can only apply if all practical and appropriate support to help the person make the decision has failed.

What does the Act mean by ‘inability to make a decision’?

A person is unable to make a decision if they cannot:

1. Understand information about the decision to be made (the Act calls this ‘relevant information’)
2. Retain that information in their mind
3. Use or weigh that information as part of the decision-making process, or
4. Communicate their decision (by talking, using sign language or another means)

The first three should be applied together. If a person cannot do any of these three things, they will be treated as unable to make the decision. The fourth only applies in situations where people cannot communicate their decision in any way.

Understanding information about the decision to be made

It is important not to assess someone's understanding before they have been given relevant information about a decision. Every effort must be made to provide information in a way that is most appropriate to help the person to understand. Quick or inadequate explanations are not acceptable. Relevant information includes:

- The nature of the decision
- The reason why the decision is needed, and
- The likely effects of deciding one way or another, or making no decision at all.

Information must be presented in a way that is appropriate to meet the individual's needs and circumstances. Practitioners must explain information using the most effective form of communication for that person (such as simple language, sign language, visual representations, computer support or any other means).

For example:

- A person with a learning disability may need somebody to read information to them. They might also need illustrations to help them to understand what is happening. It might also be helpful for them to discuss information with an advocate.
- A person with anxiety or depression may find it difficult to reach a decision about treatment in a group meeting with professionals. They may prefer to read the relevant documents in private. This way they can come to a conclusion alone, and ask for help if necessary.
- Someone who has a brain injury might need to be given information several times. It will be necessary to check that the person understands the information. If they have difficulty

understanding, it might be useful to present information in a different way (for example, different forms of words, pictures or diagrams). Written information, audiotapes, videos and posters can help people remember important facts.

Relevant information must include what the likely consequences of a decision would be (the possible effects of deciding one way or another)/ – and also the likely consequences of making no decision at all. In some cases, it may be enough to give a broad explanation using simple language but a person might need more detailed information or access to advice, depending on the decision that needs to be made. If a decision could have serious or grave consequences, it is even more important that a person understands the information relevant to that decision.

Retaining information

The person must be able to hold the information in their mind long enough to use it to make an effective decision. However, people who can only retain information for a short while must not automatically be assumed to lack the capacity to decide – it depends on what is necessary for the decision in question. Items such as notebooks, photographs, posters, videos and voice recorders can help people record and retain information.

Using or weighing information as part of the decision-making process

For someone to have capacity, they must have the ability to weigh up information and use it to arrive at a decision. Sometimes people can understand information but an impairment or disturbance stops them using it. In other cases, the impairment or disturbance leads to a person making a specific decision without understanding or using the information they have been given.

For example, a person with the eating disorder may understand information about the consequences of not eating but their compulsion not to eat might be too strong for them to ignore. Some people who have serious brain damage might make impulsive decisions regardless of information they have been given or their understanding of it.

Inability to communicate a decision in any way

Sometimes there is no way for a person to communicate. This will apply to very few people, but it does include:

- People who are unconscious or in a coma, or
- Those with the very rare condition sometimes known as ‘locked-in syndrome’, who are conscious but cannot speak or move at all.

If a person cannot communicate their decision in any way, the Act says they should be treated as if they are unable to make that decision. Before deciding that someone falls into this category, it is important to make all practical and appropriate efforts to help them communicate. This might call for the involvement of speech and language therapists, specialists in non-verbal communication or other professionals.

Communication by simple muscle movements can show that somebody can communicate and may have capacity to make a decision. For example, a person might blink an eye or squeeze a hand to say ‘yes’ or ‘no’.

What other issues might affect capacity?

Some people have fluctuating capacity – they have a problem or condition that gets worse occasionally and affects their ability to make decisions. For example, someone who has manic depression may have a temporary manic phase which causes them to lack capacity to make financial decisions, leading them to get into debt even though at other times they are perfectly able to manage their money. A person with a psychotic illness may have delusions that affect their capacity to make decisions at certain times but disappear at others. Temporary factors may also affect someone’s ability to make decisions. Examples include acute illness, severe pain, the effect of medication, or distress after a death or shock.

As in any other situation, an assessment must only examine a person’s capacity to make a particular decision when it needs to be made. It may be possible to put off the decision until the person has the capacity to make it.

Generally, capacity assessments should be related to a specific decision but there may be people with an ongoing condition that affects their ability to make certain decisions or that may affect other decisions in their life. One decision on its own may make sense, but may give cause for concern when considered alongside others.

Again, it is important to review capacity from time to time, as people can improve their decision-making capabilities. In particular, someone with an ongoing condition may become able to make some, if not all, decisions. Some people (for example, people with learning disabilities) will learn new skills throughout their life, improving their capacity to make certain decisions. Capacity should always be reviewed:

- Whenever a care plan is being developed or reviewed
- At other relevant stages of the care planning process, and
- As particular decisions need to be made. It is important to acknowledge the difference between:
 - Unwise decisions, which a person has the right to make, and
 - Decisions based on a lack of understanding of risks or inability to weigh up the information about a decision.

Information about decisions the person has made based on a lack of understanding of risks or inability to weigh up the information can form part of a capacity assessment – particularly if someone repeatedly makes decisions that put them at risk or result in harm to them or someone else.

When should capacity be assessed?

Assessing capacity correctly is vitally important to everyone affected by the Act. Someone who is assessed as lacking capacity may be denied their right to make a specific decision – particularly if others think that the decision would not be in their best interests or could cause harm. Also, if a person lacks capacity to make specific decisions, that person might make

decisions they do not really understand. Again, this could cause harm or put the person at risk so it is important to carry out an assessment when a person's capacity is in doubt. It is also important that the person who does an assessment can justify their conclusions.

There are a number of reasons why people may question a person's capacity to make a specific decision:

- The person's behaviour or circumstances cause doubt as to whether they have the capacity to make a decision.
- Somebody else says they are concerned about the person's capacity, or
- the person has previously been diagnosed with an impairment or disturbance that affects the way their mind or brain works, and it has already been shown they lack capacity to make other decisions in their life.

The starting assumption must be that the person has the capacity to make the specific decision. If, however, anyone thinks a person lacks capacity, it is important to then ask the following questions:

- Does the person have all the relevant information they need to make the decision?
- If they are making a decision that involves choosing between alternatives, do they have information on all the different options?
- Would the person have a better understanding if information was explained or presented in another way?
- Are there times of day when the person's understanding is better?
- Are there locations where they may feel more at ease?
- Can the decision be put off until the circumstances are different and the person concerned may be able to make the decision?

- Can anyone else help the person to make choices or express a view (for example, a family member or carer, an advocate or someone to help with communication)?

Who should assess capacity?

The person who assesses an individual's capacity to make a decision will usually be the person who is directly concerned with the individual at the time the decision needs to be made. This means that different people will be involved in assessing someone's capacity to make different decisions at different times. For most day-to-day decisions, this will be the person caring for them at the time a decision must be made. For example, a care worker might need to assess if the person can agree to being bathed. Then a district nurse might assess if the person can consent to have a dressing changed.

More complex decisions are likely to need more formal assessments. A professional opinion on the person's capacity might be necessary. This could be, for example, from a psychiatrist, psychologist, a speech and language therapist, occupational therapist or social worker. However, the final decision about a person's capacity must be made by the person intending to make the decision or carry out the action on behalf of the person who lacks capacity. As practitioners for the local authority, these decisions will largely be centred on the individuals care and support (including safeguarding) arrangements but it will be necessary to consider other elements holistically as part of this process.

What practical steps should be taken when assessing capacity?

Anyone assessing someone's capacity will need to decide which of these steps are relevant to their situation.

- They should make sure that they understand the nature and effect of the decision to be made themselves. They may need access to relevant documents and background information (for example, details of the person's finances if assessing capacity to manage affairs).
- They may need other relevant information to support the assessment (for example, healthcare records or the views of staff involved in the person's care).

- Family members and close friends may be able to provide valuable background information (for example, the person's past behaviour and abilities and the types of decisions they can currently make) but their personal views and wishes about what they would want for the person must not influence the assessment.
- They should again explain to the person all the information relevant to the decision. The explanation must be in the most appropriate and effective form of communication for that person.
- Check the person's understanding after a few minutes. The person should be able to give a rough explanation of the information that was explained. There are different methods for people who use nonverbal means of communication (for example, observing behaviour or their ability to recognise objects or pictures).
- Avoid questions that need only a 'yes' or 'no' answer (for example, did you understand what I just said?). They are not enough to assess the person's capacity to make a decision. However, there may be no alternative in cases where there are major communication difficulties. In these cases, check the response by asking questions again in a different way.
- Skills and behaviour do not necessarily reflect the person's capacity to make specific decisions. The fact that someone has good social or language skills, doesn't necessarily mean they understand the information or are able to weigh it up.
- Repeating these steps can help confirm the result.

What if someone refuses to be assessed?

There may be circumstances in which a person whose capacity is in doubt refuses to undergo an assessment of capacity. In these circumstances, it might help to explain to someone refusing an assessment why it is needed and what the consequences of refusal are but threats or attempts to force the person to agree to an assessment are not acceptable.

If the person lacks capacity to agree or refuse, the assessment can normally go ahead, as long as the person does not object to the assessment, and it is in their best interests.

Nobody can be forced to undergo an assessment of capacity. If there are serious worries about the person's mental health, it may be possible to get a warrant to force entry and assess the person for treatment in hospital – but the situation must meet the requirements of the Mental Health Act 1983 (section 135). Simply refusing an assessment of capacity is in no way sufficient grounds for an assessment under the Mental Health Act 1983. If practitioners are concerned for the welfare of an individual, they must refer the case to our legal team for support on accessing and utilising our legal mechanisms to ensure the individuals safety.

5. Best Interest Decision Making

What is the best interests principle and who does it apply to?

The best interests principle underpins the Mental Capacity Act. It is set out in section 1(5) of the Act. '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.'

The concept has been developed by the courts in cases relating to people who lack capacity to make specific decisions for themselves, mainly decisions concerned with the provision of social care or medical treatment.

This principle covers all aspects of financial, personal welfare and healthcare decision-making and actions. It applies to anyone making decisions or acting under the provisions of the Act, including:

- Family carers, other carers and care workers
- Healthcare and social care staff

- Attorneys appointed under a Lasting Power of Attorney or registered Enduring Power of Attorney
- Deputies appointed by the court to make decisions on behalf of someone who lacks capacity, and
- The Court of Protection.

However, the Act's first key principle is that people must be assumed to have capacity to make a decision or act for themselves unless it is established that they lack it. That means that working out a person's best interests is only relevant when that person has been assessed as lacking, or is reasonably believed to lack, capacity to make the decision in question or give consent to an act being done. People with capacity are able to decide for themselves what they want to do. When they do this, they might choose an option that other people don't think is in their best interests. That is their choice and does not, in itself, mean that they lack capacity to make those decisions.

What does the Act mean by best interests?

The term 'best interests' is not actually defined in the Act. This is because so many different types of decisions and actions are covered by the Act, and so many different people and circumstances are affected by it.

When working out what is in the best interests of the person who lacks capacity to make a decision or act for themselves, decision-makers must take into account all relevant factors that it would be reasonable to consider, not just those that they think are important. They must not act or make a decision based on what they would want to do if they were the person who lacked capacity.

Who can be a decision-maker?

Under the Act, many different people may be required to make decisions or act on behalf of someone who lacks capacity to make decisions for themselves. The person making the

decision is referred to as the 'decision-maker', and it is the decision-maker's responsibility to work out what would be in the best interests of the person who lacks capacity.

- For most day-to-day actions or decisions, the decision-maker will be the carer most directly involved with the person at the time.
- Where the decision involves the provision of medical treatment, the doctor or other member of healthcare staff responsible for carrying out the particular treatment or procedure is the decision-maker.
- Where the decisions relates to social care arrangements, the social worker or other adult practitioner will be responsible for acting as decision maker.
- If a Lasting Power of Attorney (or Enduring Power of Attorney) has been made and registered, or a deputy has been appointed under a court order, the attorney or deputy will be the decision-maker, for decisions within the scope of their authority.

What must be taken into account when trying to work out someone's best interests?

Because every case – and every decision – is different, the law cannot set out all the factors that will need to be taken into account in working out someone's best interests. However, the following factors should be central to the decision making process:

- Working out what is in someone's best interests cannot be based simply on someone's age, appearance, condition or behaviour.
- All relevant circumstances should be considered when working out someone's best interests.
- Every effort should be made to encourage and enable the person who lacks capacity to take part in making the decision.
- If there is a chance that the person will regain the capacity to make a particular decision, then it may be possible to put off the decision until later if it is not urgent.

- Special considerations apply to decisions about life-sustaining treatment
- The person's past and present wishes and feelings, beliefs and values should be taken into account.
- The views of other people who are close to the person who lacks capacity should be considered, as well as the views of an attorney or deputy.

What is in a person's best interests may well change over time. This means that even where similar actions need to be taken repeatedly in connection with the person's care or treatment, the person's best interests should be regularly reviewed/.

What safeguards does the Act provide around working out someone's best interests?

Anyone working out someone's best interests must not make unjustified assumptions about what their best interests might be simply on the basis of the person's age, appearance, condition or any aspect of their behaviour. In this way, the Act ensures that people who lack capacity to make decisions for themselves are not subject to discrimination or treated any less favourably than anyone else.

'Appearance' is a broad term and refers to all aspects of physical appearance, including skin colour, mode of dress and any visible medical problems, disfiguring scars or other disabilities. A person's 'condition' also covers a range of factors including physical disabilities, learning difficulties or disabilities, age-related illness or temporary conditions (such as drunkenness or unconsciousness). 'Behaviour' refers to behaviour that might seem unusual to others, such as talking too loudly or laughing inappropriately.

How does a decision-maker work out what 'all relevant circumstances' are?

When trying to work out someone's best interests, the decision-maker should try to identify all the issues that would be most relevant to the individual who lacks capacity. Clearly, it is not always possible or practical to investigate in depth every issue which may have some

relevance to the person who lacks capacity or the decision in question. So relevant circumstances are defined in section 4(11) of the Act as those:

‘(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.’

The relevant circumstances will of course vary from case to case. For example, when making a decision about major medical treatment, a doctor would need to consider the clinical needs of the patient, the potential benefits and burdens of the treatment on the person’s health and life expectancy and any other factors relevant to making a professional judgement. But it would not be reasonable to consider issues such as life expectancy when working out whether it would be in someone’s best interests to be given medication for a minor problem.

Financial decisions are another area where the relevant circumstances will vary. For example, if a person had received a substantial sum of money as compensation for an accident resulting in brain injury, the decision-maker would have to consider a wide range of circumstances when making decisions about how the money is spent or invested, such as:

- Whether the person’s condition is likely to change
- Whether the person needs professional care, and
- Whether the person needs to live somewhere else to make it easier for them.

These kinds of issues can only be decided on a case-by-case basis.

How should the person who lacks capacity be involved in working out their best interests?

Wherever possible, the person who lacks capacity to make a decision should still be involved in the decision-making process.

Even if the person lacks capacity to make the decision, they may have views on matters affecting the decision, and on what outcome they would prefer. Their involvement can help

in ensuring that we work from a least restrictive position by firstly asking if there is any reason why the person's decision, views or wishes cannot be acted upon.

The decision-maker should make sure that all practical means are used to enable and encourage the person to participate as fully as possible in the decision-making process and any action taken as a result, or to help the person improve their ability to participate.

Consulting the person who lacks capacity will involve taking time to explain what is happening and why a decision needs to be made.

This may mean that other people are required to communicate with the person to establish their views. For example, a trusted relative or friend, a full-time carer or an advocate may be able to help the person to express wishes or aspirations or to indicate a preference between different options.

How do the chances of someone regaining and developing capacity affect working out what is in their best interests?

There are some situations where decisions may be deferred, if someone who currently lacks capacity may regain the capacity to make the decision for themselves. Section 4(3) of the Act requires the decision-maker to consider:

- Whether the individual concerned is likely to regain the capacity to make that particular decision in the future, and
- If so, when that is likely to be. It may then be possible to put off the decision until the person can make it for themselves.

Some factors which may indicate that a person may regain or develop capacity in the future are:

- The cause of the lack of capacity can be treated, either by medication or some other form of treatment or therapy

- The lack of capacity is likely to decrease in time (for example, where it is caused by the effects of medication or alcohol, or following a sudden shock)
- A person with learning disabilities may learn new skills or be subject to new experiences, which increase their understanding and ability to make certain decisions
- The person may have a condition which causes capacity to come and go at various times (such as some forms of mental illness) so it may be possible to arrange for the decision to be made during a time when they do have capacity
- A person previously unable to communicate may learn a new form of communication

How does a person's wishes and feelings, beliefs and values affect working out what is in their best interests?

Section 4(6) of the Act requires the decision-maker to consider, as far as they are 'reasonably ascertainable':

(a) the person's past and present wishes and feelings (and in particular, any relevant written statements made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.'

In setting out the requirements for working out a person's 'best interests', the Act puts the person who lacks capacity at the centre of the decision to be made. Even if they cannot make the decision, their wishes and feelings, beliefs and values should be taken fully into account whether expressed in the past or now. However, their wishes and feelings, beliefs and values will not necessarily be the deciding factor in working out their best interests. Any such assessment must consider past and current wishes and feelings, beliefs and values alongside all other factors, but the final decision must be based entirely on what is in the person's best interests.

What is 'reasonably ascertainable'?

How much someone can learn about a person's past and present views will depend on circumstances and the time available. 'Reasonably ascertainable' means considering all possible information in the time available. What is available in an emergency will be different to what is available in a non-emergency but even in an emergency, there may still be an opportunity to try to communicate with the person or his friends, family or carers .

What role do a person's past and present wishes and feelings play?

People who cannot express their current wishes and feelings in words may express themselves through their behaviour. Expressions of pleasure or distress and emotional responses will also be relevant in working out what is in their best interests. It is also important to be sure that other people have not influenced a person's views. An advocate could help the person make choices and express their views.

The person may have held strong views in the past which could have a bearing on the decision now to be made. All reasonable efforts must be made to find out whether the person has expressed views in the past that will shape the decision to be made. This could have been through verbal communication, writing, behaviour or habits, or recorded in any other way (for example, home videos or audiotapes)

What role do beliefs and values play?

Everybody's values and beliefs influence the decisions they make. They may become especially important for someone who lacks capacity to make a decision because of a progressive illness such as dementia, for example. Evidence of a person's beliefs and values can be found in things like their:

- Cultural background
- Religious beliefs
- Political convictions, or

- Past behaviour or habits.

Some people set out their values and beliefs in a written statement while they still have capacity.

Who should be consulted when working out someone's best interests?

The Act places a duty on the decision-maker to consult other people close to a person who lacks capacity, where practical and appropriate, on decisions affecting the person and what might be in the person's best interests. This also applies to those involved in caring for the person and interested in the person's welfare. Under section 4(7), the decision-maker has a duty to take into account the views of the following people, where it is practical and appropriate to do so:

- Anyone the person has previously named as someone they want to be consulted
- Anyone involved in caring for the person
- Anyone interested in their welfare (for example, family carers, other close relatives, or an advocate already working with the person)
- An attorney appointed by the person under a Lasting Power of Attorney, and
- A deputy appointed for that person by the Court of Protection

If there is no one to speak to about the person's best interests, practitioners should seek the support of an advocate.

Decision-makers must show they have thought carefully about whom to speak to. If it is practical and appropriate to speak to the above people, they must do so and must take their views into account. They must be able to explain why they did not speak to a particular person – it is good practice to have a clear record of their reasons. It is also good practice to give careful consideration to the views of family carers, if it is possible to do so.

It is also good practice to record at the end of the process why you think a specific decision is in the person's best interests. This is particularly important if you decide to go against the views of somebody who has been consulted while working out the person's best interests.

The decision-maker should try to find out:

- What the people consulted think is in the person's best interests in this matter, and
- If they can give information on the person's wishes and feelings, beliefs and values.

This information may be available from somebody the person named before they lost capacity as someone they wish to be consulted. People who are close to the person who lacks capacity, as close family members, are likely to know them best. They may also be able to help with communication or interpret signs that show the person's present wishes and feelings. Everybody's views are equally important – even if they do not agree with each other. They must be considered alongside the views of the person who lacks capacity and other factors.

Where an attorney has been appointed under a Lasting Power of Attorney or Enduring Power of Attorney, or a deputy has been appointed by a court, they must make the decisions on any matters they have been appointed to deal with. Attorneys and deputies should also be consulted, if practical and appropriate, on other issues affecting the person who lacks capacity. For instance, an attorney who is appointed only to look after the person's property and affairs may have information about the person's beliefs and values, wishes and feelings, that could help work out what would be in the person's best interests regarding healthcare or treatment decisions.

What happens when there are conflicting concerns?

A decision-maker may be faced with people who disagree about a person's best interests. Family members, partners and carers may disagree between themselves. Or they might have different memories about what views the person expressed in the past. Carers and family might disagree with a professional's view about the person's care or treatment needs.

The decision-maker will need to find a way of balancing these concerns or deciding between them. The first approach should be to review all elements of the best interests checklist with everyone involved. They should include the person who lacks capacity (as much as they are able to take part) and anyone who has been involved in earlier discussions. It may be possible to reach an agreement at a meeting to air everyone's concerns but an agreement in itself might not be in the person's best interests. Ultimate responsibility for working out best interests lies with the decision-maker.

If disagreement continues, the decision-maker will need to weigh up the views of different parties. This will depend entirely upon the circumstances of each case, the people involved and their relationship with the person who lacks capacity. Sometimes the decision-maker will find that carers have an insight into how to interpret a person's wishes and feelings that can help them reach a decision.

At the same time, paid care workers and voluntary sector support workers may have specialist knowledge about up-to-date care options or treatments. Some may also have known the person for many years.

People with conflicting interests should not be cut out of the process (for example, those who stand to inherit from the person's will may still have a right to be consulted about the person's care or medical treatment). However, decision-makers must always ensure that the interests of those consulted do not overly influence the process of working out a person's best interests. In weighing up different contributions, the decision-maker should consider:

- How long an individual has known the person who lacks capacity, and
- What their relationship is.

If someone wants to challenge a decision-maker's conclusions, there are several options:

- Involve an advocate to act on behalf of the person who lacks capacity to make the decision
- Get a second opinion.

- Hold a formal or informal ‘best interests’ case conference.
- Attempt some form of mediation
- Pursue a complaint through the organisation’s formal procedures.

Ultimately, if all other attempts to resolve the dispute have failed, the court might need to decide what is in the person’s best interests.

Advocacy

An advocate might be useful in providing support for the person who lacks capacity to make a decision in the process of working out their best interests, if:

- The person who lacks capacity has no close family or friends to take an interest in their welfare, and they do not qualify for an Independent Mental Capacity Advocate.
- Family members disagree about the person’s best interests
- Family members and professionals disagree about the person’s best interests
- There is a conflict of interest for people who have been consulted in the best interests assessment (for example, the sale of a family property where the person lives)
- The person who lacks capacity is already in contact with an advocate
- The proposed course of action may lead to the use of restraint or other restrictions on the person who lacks capacity
- There is a concern about the protection of a vulnerable adult.

Legal Advice

Ultimately, if a consensus cannot be agreed between practitioners and family members on what is in the persons best interest then legal advice must be sought on what next steps to

take. In most cases where there is no agreement between parties then Haringey will make a request to the Court of Protection asking them to make a decision on what would be in the individual's best interest.

6. Recording assessments and best interest decisions

All mental capacity assessment and best interest decisions should be recorded on Mosaic through the Mental Capacity work episode which can be accessed through the 'START – NEW' tab on the front screen.

When completing the documentation practitioners must provide detailed evidence under each section which, when read, would clearly demonstrate the rationale for the decision that has been made.

Be sure to reference any way in which communication has been modified within the assessment regardless of the level of adaptation required. If you have just simply spoken slower and allowed the person more time to cognitively process the information/question given to them, make sure that this has been documented. Also, document any additional steps that have been taken to ensure engagement of the individual such as environment, time of day or support of others such as an advocate or carer.

When completing the best interest decision ensure that all options that have been discussed have been documented. A best interest decision should always weigh up more than one option and these should be clearly recorded as to the discussions that have taken place and how the option has been weighed. The least restrictive option should always be discussed and evidenced as part of this process.

7. Risk management and mental capacity

The assessment and management of risk is an essential function to the work that practitioners undertake on a daily basis. A key focus for practitioners should always be on ensuring positive risk taking, supporting individuals to maximise their independence and ensure a good quality of life. Practitioners should always be mindful that ensuring physical wellbeing does not adversely affect the individual's emotional wellbeing and happiness. Manageable and tolerable risks should always be considered if it supports the happiness and emotional wellbeing of that individual.

However, where practitioners feel there are high levels of risk to an individual and there is a known or suspected impairment or disturbance of the mind or brain it is the responsibility of the practitioner to ensure that they test the capacity of that individual. It is not sufficient to make an assumption of capacity in these circumstances.

The recent London 'Learning from SARs' (2017) report highlighted that the most common learning theme is that of missing or poorly undertaken mental capacity assessments and best interest decisions which fundamentally impacts on agencies ability to protect those individuals from harm. If we are to safeguard those that we support we must ensure that when identifying risks we are taking the appropriate steps to ensure the individuals safety especially where their ability to make informed decisions and understand risks may be impaired.