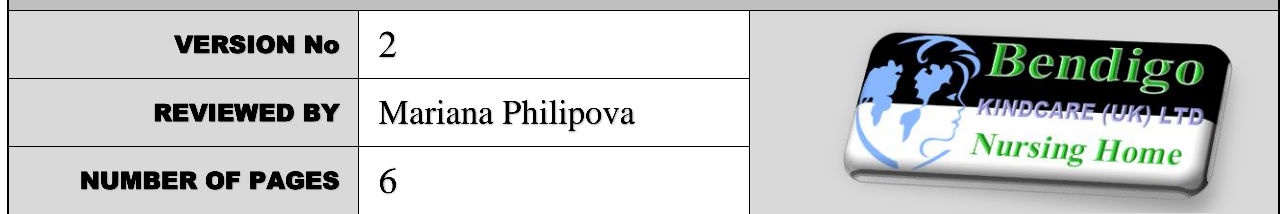
‘BEST INTEREST DECISION’

Making a Decision in a Person’s Best Interest under the MCA 2005



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POLICY

This policy sets out the principles of conduct when staff provide care, support and treatment to people who may appear to lack capacity.

There are two main principles that should be followed in practice:

A. To establish if the person who receives care, treatment and support lacks capacity and more specifically if the person is unable to make decisions and

B. If the person who receives care, treatment and support lacks capacity, a decision to be made in that persdon’s best interest.

1. ***Everyone, aged 16+, is presumed to have capacity to make their own decisions known as ‘presumption of capacity’***. This is one of the five key principles set out in Section 1 of the Mental Capacity Act. A person can however be considered to lack capacity if he or she is unable to make a particular decision at a particular point in time. This inability must be caused by an impairment or disturbance of the mind or brain, whether temporary or permanent.
2. In order to be considered as lacking in capacity to make a decision, the person must be unable to:
   - Absorb basic information about the pros and cons of an issue,
   - Retain the information for long enough to process it,
   - Weigh up the pros and cons against their own value system and arrive at a decision,
   - Communicate that decision
3. For everyday decisions about care, there is no requirement to conduct a formal assessment of capacity as the Act empowers health and social care staff to make decisions on behalf of a person who lacks capacity, so long as that decision is in the person’s best interests. The Act does however introduce a functional test for the assessment of capacity in certain situations.
4. ***MENTAL INCAPACITY IS TIME AND DECISION-SPECIFIC.*** The Act introduced a functional test for the assessment of capacity and the Mental Capacity Act’s 2007 Code of Practice (Chapter 4).
5. **Two-stage mental capacity assessment**.
   Decisions cannot be made for a person with dementia unless there is evidence that they cannot make the decision themselves. The Mental Capacity Act sets out two things that have to be checked before it can be decided that a person cannot make a decision for themselves:
   - ☑ There is some reason why the person's ability to make decisions is affected. If the person has a diagnosis of dementia, this would be true. Other examples are the effects of a stroke, some mental health problems or having a learning disability.
   - ☑ The person is unable to make the specific decision under consideration. The person would need to be unable to understand, remember or weigh up relevant information. This would also be the case if they could not communicate the decision because of lack of control over their body.
6. ***Who decides whether a person can make their own decision?***
   The person who is expected to do the mental capacity assessment is the person who might have to do something in the person's best interests. Here are some examples:

- ☑ *Care workers may need to decide if the person is able to choose whether they have a bath or not, or what food they have, or if they can take a photograph, or if they can open their post.*
- ☑ Family members may need to decide if the person is able to choose to go out with them.
- ☑ Doctors will need to decide if the person can make their own treatment decisions.
- ☑ A social worker may need to decide if the person can make a decision about staying at home or moving to a care home.

7. ***What is expected of care staff?***

   Care workers do not have to be experts in working out whether a person with dementia can make a particular decision. It is OK to have a 'reasonable belief'.

   a) But how do you establish what is a reasonable belief? If you know a person has dementia, you need to think about whether they can understand what the risks are. For example, if the person wants to leave the home, can they understand the risks of traffic? Or if a person wants to make a cup of tea, are they able to understand the risk of getting burnt?

   b) If there is no or little risk for example, deciding between tea and coffee or what music to listen to, or open their correspondence, then the person should be able to make their own decision.

   c) If you think a person with dementia is unable to make a particular decision, you should be able to give reasons for this. It is good practice to write these in their care plan. Here are some examples to show what this would look like:

      - ➢ Mrs Smith is unable to make decisions about having a wash. This is because her dementia means she does not understand the risks of not washing when doubly incontinent.
      - ➢ Mr Block has dementia and diabetes. He is unable to make decisions about what he eats. This is because he does not understand the risks of poor sugar control.

8. ***A capacity dilemma: helping with medication.***

   a) Often nurses are expected to help people with dementia to take their medication. As a nurse, you need to know if the person is making their own decisions about taking the medication or if it is being given to them in their 'best interests'.

   b) The doctor prescribing the medication should have decided this already and let the staff supporting the person aware of his or hers decision. This should be written in the care plan.

   c) If nursing staff know that a doctor has decided that a person with dementia cannot make their own decisions about taking the medication, this would be a reasonable belief. The staff would not need to do a capacity assessment each time they support the person.

   d) Where this is the case, it would be OK to encourage the person to take their medication if they are resisting it. But it would not allow the staff member to hide the medication in food or to use a form of restraint so the person takes the medication. These can only happen if it is written in the care plan and have a management plan of covert administration of medicines and agreed by a doctor and a LPA for health decisions or family member as being in the person's best interests.

   e) If a nurse thinks that person with dementia is able to make their own decisions about medication they should make sure the doctor is aware of this.

C. *If the person who receives care, treatment and support lacks capacity, a decision to be made in that persdon's best interest.*

1. ***The law says that it is important that every reasonable effort has been made to try to support people to make their own decisions.*** If a person is unable to make a particular decision and has not made plans about this in advance then someone else, such as care staff or other professional, will have to decide what should happen. **In these circumstances the person should still be involved in the decision-making process as much as possible and all actions and decisions must be taken in their best interests and recorded.**

2. *How does someone work out what would be in another person's best interest:*

Although there is no single definition of what would be in a person's best interests, the new Act gives a non-exhaustive checklist of things that must be considered when another person is making a decision for someone else:

a) *Whether the decision can be delayed in case they regain the ability to make the decision in the future, for example, as a result of recovering from an episode or illness, learning new skills, or getting support with communicating their wishes.*
b) *The law says that when someone is working out what is in the best interests of another person, they cannot make a decision based merely on their appearance, age, medical condition, or behaviour.*
c) *When deciding what would be in their best interests all the relevant information needs to be considered, and it is important to involve them as much as possible in decisions affecting them.*
d) *Their wishes, feelings, values and beliefs. This includes any views they have expressed in the past that would help to understand what their wishes and feelings might be. This may be things they have said to other people, how they have behaved in similar circumstances in the past and especially things they have written down. This places them at the centre of any decision being made on their behalf.*
e) *The views of their family members, parents, carers and other relevant people who support them or are interested in their welfare, if this is practical and appropriate. If they have named someone particular or given someone powers to decide for them then they should be consulted.*
f) *If decisions are being made about treatment that is needed to keep them alive, people are not allowed to be motivated by a desire to bring about their death, and they must not make assumptions about the quality of their life.*

This checklist is not intended to be all-inclusive and other relevant factors may need to be considered when making a 'Best Interests Decision', along with conferring with other interested parties. Not all of these checklist factors above will be applicable, but it is still necessary to consider each of these, even if it is found that they are not relevant to the particular decision. Anything else that is relevant must be considered even if it is not included in the checklist.

3. *Key points:*

- ✓ ***When a person with dementia lacks capacity to make a decision, care workers must do what is in the person's best interests.***
- ✓ ***The person with dementia should still be involved in making the decision, staff should find out their views and wishes.***
- ✓ ***People who know the person well such as family, friends and care staff, should be consulted.***
- ✓ ***These decisions are known as 'best interest decisions' and should where possible limit restrictions placed on the person.***
- ✓ ***Some people with dementia will have an attorney or deputy with legal powers to make some best interests decisions on their behalf.***
- ✓ ***It is a crime to wilfully ill-treat or neglect a person lacking capacity to make some decisions.***

4. *How the best interest decision must be made:*

a) *Where it has been decided that a person with dementia is unable to make a decision for themselves, care staff must do what is in the person's best interests. This is known as a 'best interests decision'.*
b) *When deciding what is in the person's best interests staff need to:*
   - ✓ *Involve the person in the decision as much as possible. Find out what their views and wishes are (including those they had before they lost capacity to make the decision). Where possible involve the person at meetings where decisions are being made about them.*
   - ✓ *Talk to people who know them well: this could include family and friends, but also those care staff who have a good knowledge of the person.*

- ✓ *Try to limit restrictions on the person. For example, if the person does not understand the risks of going out by themselves, make sure they still have opportunities to do this with the necessary support.*

5. ***Decisions about health treatment:***
   a) Doctors and sometimes nurses are responsible for deciding whether people with dementia can make decisions about their treatment. This includes any treatment for the dementia as well as all other health issues. If they find that the person is unable to do this, they then have to decide what would be in their best interests.
   b) Doctors should speak to care staff who know the person well when they make best interests treatment decisions. This is in addition to family and friends.
   c) Care staff may be able, for example, to provide information about:
      - ***what the person's views and wishes are, including things they may have said before they developed dementia or at an earlier stage of dementia***
      - ***which family and friends need to be involved***
      - ***how the person would cope with injections or other forms of treatment.***
   d) The Mental Capacity Act allows people to make 'advance decisions to refuse treatments'
   e) Doctors must comply with advance decisions to refuse treatment unless it is found that the person lacked capacity to make the decision at the time the statement was made. The only other exception is if new treatments have come in which may have affected the person's decision had they known about them at the time.
   f) When serious medical treatment decisions have to be made in someone's best interest and the person does not have family or friends who can represent them, the person must be supported by a special kind of advocate: an Independent Mental Capacity Advocate (IMCA).
   g) In some cases a person with dementia may have given power to someone else to make their health decisions. This is called a Lasting Power of Attorney for personal welfare.

6. ***Staff supporting people with dementia with medical treatment:***
   a) While care staff will not make decisions about what treatment a person with dementia has, they are often involved in giving the treatment, for example, supporting the person to take medication or to apply cream.
   b) When this happens care staff must have a reasonable belief that either:
      - the person has asked for help with their treatment or
      - the person lacks capacity to make a decision about the treatment and it is being given in their best interests.
   c) If a doctor has prescribed the treatment to a person with dementia, this would be enough basis for care staff to have a reasonable belief that the treatment is in the person's best interests.

7. ***Decision about where the person lives or stays:***
   a) Decisions about staying at home, going into hospital or moving to a care home are often made for people with dementia. Where possible, the person must be supported to make these decisions themselves.
   b) These are very important decisions so a lot of care must be taken to check whether the person can make the decision themselves before making a decision in their best interests. Usually social workers, care managers or doctors will assess capacity. At times it may be necessary for someone else to check the person's capacity if it is unclear. This could be an experienced social worker, psychologist or psychiatrist.
   c) If the person lacks capacity to make decisions about where they live, the local authority or NHS trust is likely to make the decision. This includes the hospital admitting the person, the local authority funding the person's placement in a care service or a primary care trust funding a nursing home placement.
   d) In some cases a person with dementia may have given power to someone else to make a decision about where they live. This is called a 'Lasting Power of Attorney' for personal welfare

e) People lacking capacity to make decisions about where they live, who do not have family or friends to represent them, must be supported by an Independent Mental Capacity Advocate (IMCA). This is necessary if the person is due to stay in hospital for more than 28 days or in a care home for more than 8 weeks.

f) There are other safeguards in the Mental Capacity Act for people lacking capacity to make decisions about where they live if staying in a hospital or care home will be very restrictive. This may include situations where the stay goes against the wishes of the person themselves or their family, restraint will be used, or they are restricted from going out as much as they would want to. These are called the 'Deprivation of Liberty Safeguards'

8. ***The neglect or ill-treatment of people with dementia:***

The neglect or ill-treatment of people lacking capacity to make some decisions is now recognised as a crime under the Mental Capacity Act. This applies to all those who work with people who have dementia, including care staff and professionals.

THE MAXIMUM SENTENCE IS FIVE YEARS IN PRISON!!!

PROCEDURE

A. ***To establish if the person who receives care, treatment and support lacks capacity and more specifically if the person is unable to make decisions:***

First and foremost, there is a 'presumption of capacity'. *A person's capacity may be dependent on many factors. It can fluctuate and may vary depending on the subject matter involved. Incapacity arises if a person is unable to make a decision because of an impairment of, or a disturbance in the functioning of the mind or brain. The legal test for this is as follows (form **ADL 1a** in the residents' care plans):*

MENTAL CAPACITY ASSESSMENT CHECK LIST			
No	**QUESTIONS**	**YES**	**NO**
1	Is the patient able to understand the information relevant to the decision?		
2	Is the patient able to retain that information?		
3	Is the patient able to use or weigh that information as part of the process of making a decision?		
4	Is the patient able to communicate his/her decision? *(This could be by any possible means, such as talking, using sign language or even simple muscle movements such as blinking an eye or squeezing a hand)*		
If the answer to any of these questions is 'No' then the patient lacks capacity.			
Assessment of capacity must be decision and time specific and must optimise the person's ability to make the decision themselves.			

a) The Act does not cover decision relating to:

- Consent to sexual relations; consent to divorce or dissolution of a civil partnership

b) There are also several tests of capacity that have been produced following judgments in court cases. These are known as common law tests. They cover capacity to:

- make a will
- make a gift (although attorneys can also make gifts)
- enter in to litigation (take part in legal cases)

- enter in to a contract
- enter in to marriage

B. ***If the person who receives care, treatment and support lacks capacity, a decision to be made in that persdon's best interest.***

The Act provides a checklist that must be followed when making best interest decisions. The list is not exhaustive so other factors may be considered. The focus is on the person lacking capacity rather than the decision maker's own personal views. The decision maker must ask what the person who lacks capacity would have wanted.

'BEST INTEREST DECISION' CHECK LIST				
No	**QUESTIONS**	**YES**	**NO**	**N / A**
1	Has all the relevant circumstances been considered?			
2	Is the person likely to regain capacity and is that likely to be in time to make the decision?			
3	Has the person been involved, or has the person been encouraged to participate in the decision?			
4	Has the individual's own past and present wishes and feelings been considered?			
5	Has any advance statements or decisions made been considered?			
6	Has the individual's beliefs and values been considered?			
7	Has the views of family and informal carers been considered?			
8	Has the least restrictive alternative or intervention been considered?			
9	This decision is not motivated to bring about death?			
Additionally, 'best interest decision' must also: **1. Demonstrate that any conflicting evidence have been carefully assessed, and** **2. Provide clear and objective reasons the need to act in the person's best interests.**				
Other key people could include Lasting Power of Attorneys or a deputy appointed by the Court of Protection. When recording 'Best Interests Decision' each of the points in 'Best Interests Checklist' should be addressed.				

The role of the staff is to support the 'Best Interests Decision' making process by providing relevant information *pertaining to the situation*. The Data Protection Act and issues around confidentiality still apply and consent must still be obtained to provide the information requested.

Related Policy
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