



Mental Capacity Act 2005

Guidelines for undertaking Capacity Assessments and
making Best Interest Decisions

January 2014

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Introduction

The Mental Capacity Act provides a legal framework that clearly defines the procedure that must be followed when decisions need to be made that involve a person over sixteen years of age who may not have the capacity to make the decision for themselves. The Act supported by the accompanying Code of Practice, sets out how the person's capacity should be assessed, and if they are found to lack capacity, how decisions should be made on their behalf and who should make them.

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. 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.

The Act applies to all of us. There may be a time in our own lives when our capacity or that of a family member is affected. The Act also gives us all the opportunity to plan ahead and make decisions now about our health and finances for a time when we might lose our capacity.

Under the Mental Capacity Act, capacity assessments are the responsibility of the person who has responsibility for the decision. Throughout this Guidance (and the Mental Capacity Act Code of Practice) the person with responsibility for the decision is referred to as the Decision Maker.

The Decision Maker is likely to be the person within the organisation who would normally discuss the decision with the person and support them to make a decision. The Decision Maker may involve others in the assessment when necessary, though the Decision Maker has the responsibility to arrive at a Best Interests decision on behalf of a person who lacks capacity, unless someone else has the legal authority to do this (see section 6).

In the course of their work, all levels of health and social care staff will need to assess a person's capacity to make a particular decision and different levels of decision will require different levels of assessment. The legislation gives protection from liability if it can be evidenced that regard has been given to the Code of Practice and due process has been followed.

This Guidance is intended to provide support in carrying out and recording formal capacity assessments and is not intended as a substitute for the Code of Practice. All people and professionals involved with working or caring for a person who lacks capacity to make a decision must have regard to the Mental Capacity Act Code of Practice available at:

www.justice.gov.uk/guidance/mca-code-of-practice.htm 2 or on the Adult Social Care Manual via the following link:

http://www.proceduresonline.com/lincolnshire/adultsc/chapters/g_legislation.html#code_practice

1. AIS Recording Guidance. Recording Mental Capacity Assessment Activity

1.1 When a Mental Capacity Assessment is completed by a Practitioner, or is received from an external agency/worker this needs to be recorded in Assessments on AIS.

1.2 The Assessment type of 'Mental Capacity Assessment' needs to be used including start and end dates.

1.3 One of the following two Assessment Outcomes needs to be recorded: "MCA - Progressed to Best Interest Decision" or "MCA - Not Progressed to Best Interest Decision".

1.4 When progressing to a Best Interest Decision this needs to be captured in the "Adults Best Interest Decision" Case Note in AIS.

2. Principles of the Mental Capacity Act

2.1 The Mental Capacity Act sets out 5 statutory principles that underpin the legal requirements of the Act. (MCA 2005 Section 1; MCA 2005 Code of Practice Chapter 2)

1. Assume Capacity: "a person must be assumed to have the capacity to make the decision in question unless it is established that he or she lacks the capacity to do so." The legislation is weighted towards the assumption of capacity. If the person is assessed as lacking capacity the capacity assessment should clearly demonstrate and record the reasons that this conclusion has been reached.

2. Seek to prove capacity: "a person is not to be treated as unable to make a decision unless all practicable steps to help her or him to do so have been taken without success" The legislation requires that the assessor takes all reasonable steps to support the person to participate fully in the assessment and to make the decision for themselves.

3. Respect decisions taken: "a person is not to be treated as unable to make decisions merely because she or he makes an unwise decision." Where a person has capacity to make a decision this should be respected even if we consider that it is 'unwise.' What is important here is that the assessor must be able to demonstrate that this was an informed decision and that the consequences of inaction, or not making the decision have been discussed. This challenging area of practice is explored further throughout the guidance and in section 11 Unwise Decisions, Duty of Care and Inherent Jurisdiction.

4. Act in Best Interests: "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 or her best interests" This is detailed in chapter 5 of the Code of Practice and is addressed in detail in section 8.

5. Protect Autonomy: "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 achieved in a way that is less restrictive of the person's rights and freedoms of action" This is detailed in chapter 5 of the Code of Practice and is addressed in detail in section 8.

3. When to assess capacity and who should carry out the assessment?

3.1 The Mental Capacity Act applies to adults (aged 16 years or over).

3.2 There are two broad situations when a person's capacity might need to be assessed:

- As part of a needs or risk assessment
- When a person needs to agree (or not) to a health or social care treatment or act

3.3 These situations relate to different scales of decisions

- Day to day decisions or risks taken as part of ongoing care relationships (such as bathing, feeding or dressing)
- Significant decisions that have more serious consequences (such as change in accommodation or home care provision; serious medical treatment or Adult Safeguarding concerns)

3.4 A Capacity Assessment may be triggered when there are doubts over a person's capacity to make a decision. Doubts may arise from a person's behaviour or the circumstances of the decision. While each decision needs to be assessed separately, a person's lack of capacity to make decisions in one area of life may give cause to doubt capacity to make a decision in another.

3.5 Assumptions should not be made about a person's lack of capacity to make a decision. A person's circumstances or behaviour or lack of capacity to make other decisions must not be taken as evidence of a lack of capacity to make a particular decision. Where there are doubts, however reasonable and significant, a capacity assessment for the decision in question must still be completed and recorded.

3.6 Although capacity assessments sometimes require input from other people and professionals, it is the responsibility of the Decision Maker to coordinate and 'own' the capacity assessment overall. Where the person is subject to multi-disciplinary care, the professional with greatest responsibility for the specific decision is likely to be the Decision Maker and should ideally assess capacity. Where this is in doubt agreement should be sought within the multidisciplinary team. If it is evidenced that a specialist capacity assessment (such as by a psychologist) is needed and which is being relied on for this decision the decision-maker must be satisfied that this assessment is fit for purpose.

3.7 There are certain decisions which can never be made on behalf of a person who lacks capacity to make those specific decisions. This is because they are either so personal to the individual concerned, or governed by other legislation. Sections 27–29 and 62 of the Act set out the specific decisions which can never be made or actions which can never be carried out under the Act, whether by family members, carers, professionals, attorneys or court appointed deputies. These are detailed in paragraphs 1.10 to 1.11 of the Code of Practice and include consenting to marriage or a civil partnership and consenting to have sexual relations. Only the Court of Protection can make these decisions.

4. Assessments as part of needs or risk assessments and day to day decisions

4.1 Capacity should be considered as part of a needs or risk assessment. A person with capacity may be making an autonomous lifestyle choice that should be respected (principle 3 of the Mental Capacity Act). A person assessed as lacking capacity is not making an informed choice about a situation and may lack the ability to understand the nature and consequences of the risk. In the event the person is assessed as lacking capacity the decision about how to proceed should be made in their best interests.

4.2 Day to day decisions, such as what to wear or what to buy in the weekly shopping do not need formal assessments. These assessments can be written in the relevant record.

5. Capacity to agree to a social care decision

5.1 The purpose of this assessment would be to establish whether the person has the capacity to agree (or not) to a social care decision

5.2 Day to day care acts such as personal care do not require formal assessment and should be recorded in the relevant record.

5.3 Formal Assessments recorded using the paperwork that is currently endorsed by Lincolnshire County Council are required for more significant decisions. The practitioner can exercise discretion about the level of detail that is recorded, however they must be satisfied that their record is robust, evidences good practice and will withstand scrutiny. These may include:

- Decisions about changes in the person's accommodation
- Decisions about care packages and support
- Financial arrangements
- Decisions about how to manage identified risks

5.4 Formal Assessments using the paperwork that is currently endorsed by Lincolnshire County Council would be appropriate in other circumstances such as:

- Situations when restraint may have to be considered
- When there are disagreements over needs, treatment or care
- When assessment is required for legal action
- In relation to Adult Safeguarding concerns.

6. Identifying the Decision Maker

6.1 The Decision Maker will be the person or professional who is responsible for making the decision identified, or undertaking the action on behalf of the person if it is established that they lack capacity unless there is a valid and applicable Enduring Power of Attorney, Lasting Power of Attorney (LPA) or Court Appointed Deputy then the Attorney or Deputy will be the Decision Maker for the decision if it is within the scope of their authority. Note: You must verify the authority before the Attorney or Deputy can be permitted to act as Decision Maker.

6.2 Where people have capacity and want to plan ahead the Act introduced two new Lasting Powers of Attorney which replace the previous Enduring Power of Attorney. There are no new Enduring Powers of Attorney being made but existing ones are still valid. The Enduring Power of Attorney only gives powers to help a person to manage their property and finances. The two new types of Lasting Power of Attorney are:

- Lasting Power of Attorney for Property and Affairs. A Person (the Donor) can make an LPA giving an Attorney the right to make decisions about property and affairs (including financial matters).
- Lasting Power of Attorney for Personal Welfare. This can be used to appoint an Attorney to make decisions about personal welfare, which can include healthcare and medical treatment decisions (including Continuing Health Care Decisions).

6.3 An LPA must be registered with the Office of the Public Guardian (OPG) before it can be used. An unregistered LPA will not give the Attorney any legal powers to make a decision for the donor. Different people can be appointed to the different roles. A person might decide to appoint their solicitor to deal with their property and affairs and make a family member an Attorney for Personal Welfare. When a person makes an LPA they can specify what decisions the Attorney can make on their behalf and in what circumstances. The Attorney can only make decisions covered by the scope of their authority.

6.4 To ensure that you are clear about the scope and authority of the powers held and to verify the power is registered you must request to see a copy which is to be held on the person's file. It would be advisable to ask that any relevant paperwork is made available to you when you visit and to explain the reasons for this. It will then be possible to check if the Attorney's authority is valid and applicable to any decision which needs to be made at a future date. Until this has been done the identified Decision Maker continues to be responsible for making the decision.

6.5 Where people no longer have capacity to grant an LPA the Mental Capacity Act allows the Court of Protection to appoint a Deputy to act on the person's behalf. Court Appointed Deputies can be appointed with the following powers.

- Court Appointed Deputy – Property and Affairs. Covering decisions about finances and property.
- Court Appointed Deputy - Personal Welfare. Covering decisions about personal welfare, which can include healthcare and medical treatment decisions (including Continuing Health Care Decisions).

6.6 Once a Deputy has been appointed by the Court, the order of appointment will set out their specific powers and the scope of their authority. On taking up the appointment, the Deputy will assume a number of duties and responsibilities and will be required to act in accordance with certain standards. Failure to comply with their duties could result in the Court of Protection revoking the order appointing the Deputy and, in some circumstances; the Deputy could be personally liable to claims for negligence or criminal charges of fraud. Deputies should always inform any third party that the Court has appointed them as Deputy. The Court will give the Deputy official documents to prove their appointment and the extent of their authority.

6.7 To ensure that you are clear about the scope and authority of the powers held by the Court Appointed Deputy you must request to see a copy which is to be held on the person's file. It will then be possible to check if the Deputy's authority is valid and applicable to any decision which needs to be made. Until this has been done the identified Decision Maker continues to be responsible for making the decision.

6.8 An Attorney or a Court Appointed Deputy must always act in accordance with the Code of Practice and they must follow the five statutory principles. If there are concerns about the conduct of an Attorney or Court Appointed Deputy this should be brought to the attention of the Office of the Public Guardian or alerted according to Adult Safeguarding protocols. Detailed guidance on Lasting Powers of Attorney and the Court of Protection can be found in chapters 7 and 8 of the Code of Practice.

6.9 Before the Mental Capacity Act gave a clear legal framework detailing how decisions should be made and by whom, asking family to agree to a decision or action when the person lacked capacity to consent was common practice. It is important to remember that a person's family or next of kin have no legal right to make a decision on behalf of a relative over the age of 16 years who does not have capacity to make that decision for themselves unless they are an Attorney with a Lasting Power of Attorney, or a Court Appointed Deputy with a Court Order that is valid and applicable to the decision that needs to be made. In the absence of this being the case the identified Decision Maker is responsible for making the decision.

6.10 If you are unclear about who should be the Decision Maker seek further guidance.

6.11 Information on LPAs and Court Appointed Deputies can be found on the Office of the Public Guardian (OPG) website at ww.justice.gov.uk or by calling 0300 456 0300. It is possible to check if an LPA has been registered by completing the OPG 100 form. This is a free service. The OPG has an Adult Safeguarding function and any concerns about the conduct of an Appointee, Attorney or Deputies should be reported to them.

7. Advance Statements and Preferred Place of Care statements

7.1 The Mental Capacity Act gives people the opportunity to plan ahead to a time when they may lose capacity and may wish to refuse particular types of medical treatment, or in some cases life sustaining treatment. An Advance Decision to Refuse Treatment can be legally binding if it is correctly recorded and it is valid and applicable to the medical circumstances and the treatment being proposed. The Code of Practice states that it is the responsibility of the healthcare

professional proposing the treatment to make this decision. Detailed guidance can be found in Chapter 9 of the Code of Practice.

7.2 The person may have recorded their preferences for care arrangements in an advance statement or a Statement of Preferred Place of Care. These should be taken as strong indications of preferences and wishes though they are not legally binding in themselves.

8. Capacity Assessments

Be specific about documenting the decision

8.1 Capacity Assessments should be made in relation to a particular decision required at a particular time. In terms of the Mental Capacity Act, capacity relates to a specific decision at a specific time and not to a general ability to make decisions.

8.2 The Mental Capacity Act is clear that 'blanket' statements that indicate that a person lacks capacity to make several or all decisions are not acceptable.

8.3 The assessment is required for each specific decision. Separate decisions in complex situations would require separate documentation, though they may be assessed within a single assessment process. For example, in accommodation decisions, a person's capacity to decide on accommodation and on financial management may need to be assessed. Although these aspects would require separate assessment documentation they could be assessed within the same process. For information see: Mental Capacity Act 2005 Section 2 and Mental Capacity Act 2005 Code of Practice Chapter 4

Two Stage Capacity Test

8.4 A person is said to lack capacity under the Mental Capacity Act if they have an impairment or disturbance of the functioning of the mind or brain and they are unable to achieve at least one of the four decision-making elements defined in stage 2 because of this. The Assessor should have regard to whether capacity will be regained and whether the assessment can be delayed.

Stage 1: Diagnostic test

8.5 As laid out in the Mental Capacity Act 2005 Section 2(1), Stage 1 of the statutory framework for capacity assessment determines whether or not the person has "an impairment of, or a disturbance in the functioning of, the mind or brain". The person does not have to have a diagnosis. Sometimes the people you work with have not been assessed previously, and even if they are known to services they may not have a formal diagnosis. The Mental Capacity Act asks that you evidence your belief that the person has an "an impairment of, or a disturbance in the functioning of, the mind or brain". Evidence for this can be taken from existing records or diagnosis, your knowledge of the person, or it might be based on your observations and information given by others. You may be required to assess a person who is clearly confused but you may not know the cause at that time. The assessor is required to record reasonable evidence that the person has an impairment or disturbance. Evidence could refer to:

- Existing and current diagnosis (including dementia, mental health condition; learning disability)
- The person's behaviour and presentation that you are encountering which might include cognitive and memory impairment
- Substance use
- Physical conditions that can cause confusion such as Stroke, Urinary Tract Infection.

8.6 The disturbance or the impairment may be permanent, long term or temporary.

8.7 If there is no reasonable evidence for an impairment or disturbance of the functioning of the mind or brain, the person cannot be deemed to lack capacity under the Mental Capacity Act. The Capacity Assessment is ended and the Mental Capacity Act cannot be further applied.

8.8 If there is evidence of an impairment or disturbance under stage 1, then the capacity assessment can progress to stage 2. The impairment or disturbance in itself must not be taken to indicate a lack of capacity.

For information see: Mental Capacity Act 2005 Section 2 and Mental Capacity Act 2005 Code of Practice 4.11 & 4.12

Stage 2: Functional test

8.9 If there is evidence that the person does have an impairment or disturbance in the functioning of the mind or brain, the second stage of the assessment determines if the person can be supported to make the decision in question.

8.10 The Mental Capacity Act 2005 Section 3 defines four elements of a decision. A person needs to:

1. Understand the information relevant to the decision
2. Retain the information for long enough to make the decision
3. Weigh the information relevant to the decision
4. Communicate the decision by any means. This could be by using communication aids and does not have to be verbal. A person having difficulty with speech, such as after a Stroke, may be able to nod or give the 'thumbs up'.

8.11 In order to be assessed as having capacity, the capacity assessment needs to demonstrate that the person can achieve all four elements of stage 2. It follows from this that if the capacity assessment demonstrates an over-riding difficulty with a single element then the person can reasonably be said to lack capacity. Nevertheless, all sections of stage 2 still need to be considered and recorded.

8.12 The Act lists the four elements of a decision. In practice, the assessment of capacity can look at the whole process, for example the person's ability to communicate is implied throughout the assessment. Communication difficulties may be the reason that prevents the person understanding information. The same piece of evidence or assessment may support different elements of the process - for example, a person's inability to weigh information may also demonstrate a significant difficulty to understand it.

Understanding

8.13 The Decision Maker has an obligation to ensure that the information is correct and that the person is supported to understand it.

8.14 The Assessment must include details of how the assessor attempted to help the person understand the information and strategies used. These may include, amongst others,

- Simplifying language used and providing it in small chunks
- Using visual aids and prompts
- Controlling the environment to help the person absorb the information
- Choosing the time of day when the person is most alert, or seeing the person more than once
- Using translations and interpreters

8.15 Cultural and linguistic needs should be considered. Other professionals can be involved, such as speech and language specialists and family, carers and friends should also be involved if they can assist the person.

Retaining

8.16 There is no absolute standard against which some one's ability to retain information can be measured; it is a matter of what can be considered reasonable in each decision. A person may be able to make a decision but then forgets it shortly afterwards. One way to look at this is to consider if the person would give you the same response if you asked them the same question a second or third time. For example a person with memory impairment may be clear that they want a specific family member to manage their finances and be consistent in their response to the question, even though they may not remember that they have answered the question before.

8.17 The assessment must record the attempts made to assist the person retain the information. This record may include:

- Use of written or drawn material
- The person being assessed repeating the information in his/her own words
- Subsequent meetings to see if the person has retained information previously given

Weighing

8.18 The Code of Practice states that the person must have the ability to weigh up information and use it to arrive at a decision. In some cases the impairment of the mind or brain leads a person to make a decision without understanding or using the information they have been given.

8.19 However, the third principle of the Act states that a person may make an unwise decision, one that would mean taking an option that others may not regard as in their best interests. This would not in itself show that the person has not weighed the information.

8.20 Weighing information is a matter of understanding the possible courses of action available. In this way, a person would need to show that they understood the different options available, and the consequences of taking, or not taking, a course of action.

8.21 The assessor must record the attempts made to help the person identify and weigh up various options. If the person cannot weigh up the decision because they have not been given the options and relevant information, the Court of Protection will not be sympathetic to a Local Authority argument that the person lacks capacity. The record may include:

- The list of options presented to the person, including the 'undesirable' or 'unwise' ones
- How the pros and cons of each option and any associated risks were identified
- Use of supported decision making tools (such as sheets comparing options or decision trees)
- How the reasons for choosing one option were explored (there may be an underlying reason which could be addressed, for example worries about using a bus might be the reason someone chooses not to attend a hospital appointment)

Communicating their decision

8.22 All practical steps should be taken to support a person to communicate their decision. This may involve speech and language specialists. The issue of communication holds throughout the assessment. The requirement to demonstrate that the person can weigh information presupposes that the person can communicate how they have weighed the information. Indeed, the ability to communicate the decision is not simply the ability to indicate the decision; it takes place within the whole assessment process.

8.23 The assessor must record how the person was supported to communicate. This may include:

- Using translation and interpretation
- Consulting family, friends, carers over how best to communicate
- Using non-verbal communication such as diagrams or sign language
- Reducing anxiety: using comfortable, familiar surroundings

Conclusion: Does the person have the capacity to make the decision?

'YES' to ALL of the elements of Stage 2

8.24 If the person is able to complete all four elements of a decision then the person has capacity to make the decision as defined by the Mental Capacity Act. The Act cannot be applied and the assessment process is ended. They can also make an 'unwise' decision. This must be respected though not necessarily supported.

No to ANY of the elements of Stage 2

8.25 If, after establishing stage 1, a person is regarded as unable to achieve any one of the four parts of the functional test, then they can be reasonably said to lack capacity and the assessor can be said to have a 'reasonable belief' that the person lacks capacity.

8.26 Almost by definition "reasonable belief" is not intended to be exact or absolute. There are some 'rules of thumb' to help arrive at a reasonable belief. One would be to consider if another professional could reasonably be expected to reach the same conclusion. What can be considered reasonable will also be determined by the amount of time available for the decision. If the decision is not urgent the assessor may be able to visit the person several times or wait to see if the person regains capacity following treatment, however there would not be time to do this in an emergency.

8.27 There may be circumstances in which a person whose capacity is in doubt refuses to undergo an assessment of capacity or refuses to be examined by a doctor or other professional. 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 it can go ahead if it is in their best interests.

8.28 Some people have fluctuating capacity – they have a problem or condition that gets worse occasionally and affects their ability to make decisions. This would need to be taken into account by the assessor. 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. More guidance on how to support someone with fluctuating or temporary capacity to make a decision can be found in the Code of Practice chapter 3, particularly paragraphs 3.12–3.16. It can be very difficult to reach a conclusion about a person's capacity and in some cases advisable to seek a second opinion. In cases where a person's capacity fluctuates it is quite possible for different assessors to reach different conclusions depending on when they assessed the person.

8.29 In cases where consensus cannot be reached about a reasonable belief that the person lacks or does not lack capacity the Court of Protection can make this decision if required. A judge can still find the person has or lacks capacity in the face of consensus of evidence to the contrary – the Court is the ultimate arbiter, and the person does not need a full grip of every nuance of the relevant information, but a broad understanding – see *CC v KK* (2012) EWHC 2136 (COP).

Impaired decisions based on duress and undue influence

8.30 A person who has mental capacity to make decisions may have their ability to give free and true consent impaired if they are under constraint, coercion or undue influence. Duress and undue influence may be affected by:

- Eroded confidence;
- Fear of reprisal or abandonment;
- Sense of obligation;

- Cultural factors;
- Power relationships.

8.31 Though this may affect a person's ability to make decisions, it does not remove the rights of the person to make decisions. Nor does it provide any authority to override the person's wishes. The role of services is to support the person to make decisions and take positive action to prevent or stop another individual from interfering with their rights.

8.32 Some situations may involve a criminal act and involve the police. In other circumstances, the High Court could be approached to exercise inherent jurisdiction if there are concerns that the person has capacity but is making decisions under coercion or duress which are placing them at significant risk.

For Guidance see: Mental Capacity Act 2005 Section 3 and Mental Capacity Act 2005 Code of Practice 4.13 – 4.32

9. Best Interests Decisions Introduction

9.1 The principle of best interests covers all aspects of financial, personal welfare and healthcare decision-making and actions. Certain decisions are excluded because they are either so personal to the individual concerned, or governed by other legislation and include consenting to marriage and consenting to have sexual relations. For full details see 1.8 to 1.11 of the Code. The Decision Maker should be aware of the excluded decisions and identify if an application to the Court of Protection is indicated. The Decision Maker should also identify if there is someone with the legal authority to make the decision. If so, the decision should be deferred to those arrangements (see section 6 above).

9.2 If the person has been assessed as lacking capacity the Decision Maker must make the decision on their behalf and in their best interests. As laid out in Section 4 of The Mental Capacity Act 2005 and chapter 5 of the Code of Practice, any decision made in the person's best interest must be determined against a statutory checklist of considerations. The Decision Maker should consider whether capacity will be regained and whether the decision can be delayed if it is not urgent.

9.3 The Best Interests check-list also requires the decision maker to consider:

- The likelihood of the person regaining capacity in relation to the question
- Involving the person as fully as possible in the decision

For guidance see: Mental Capacity Act 2005 Code of Practice Chapter 5

Best Interests Consultations

9.5 The Mental Capacity Act places a duty on the Decision Maker to consult with anyone who may have a relevant interest in the decision or who may offer valuable insight and information as to the person's wishes, feelings and beliefs and should consult with anyone engaged in caring for the person or interested in the person's welfare. This would include family members and next of kin, as well as anyone else identified as being involved or interested in the person's care or treatment.

9.6 It may be that someone involved in the care of the person may not be appropriate to consult because of adult protection concerns or some other reason such as lack of willingness or availability to do so. In these cases, and if the other criteria are met, a referral should be made to the IMCA

9.7 The Decision Maker should make reasonable efforts to consult with anyone the person has named to be consulted. It should be remembered that a person might lack the capacity to make the decision and yet retain the capacity to name people they trust and would like to be involved in their care.

9.8 Consultation should not be limited to those people named by the person to be consulted: other relevant people such as neighbours and known friends could offer valuable understanding regarding the person's wishes if it is appropriate and would not compromise confidentiality to consult them.

9.9 The Consultation should cover what is known of the wishes, feelings and beliefs of the person who lack capacity, in relation to the decision. It should also include the opinion of the person being consulted regarding a best interests decision.

9.10 Paragraph 5.39 of the Code of Practice asks the Decision Maker to consider what is 'reasonably ascertainable'. The Code of Practice recognises that how much someone can learn about a person's past and present views will depend on circumstances and the time available. Stating that '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 their friends, family or carers (see chapter 3 for guidance on helping communication).

9.11 Details of who was consulted and what their views were should be recorded on the appropriate paperwork endorsed by Lincolnshire County Council.

Best Interests Considerations

9.13 Following consultations with relevant parties, the Decision Maker needs to record all the information known or found regarding the person's wishes, feelings and beliefs regarding the decision. This should include any attempts made to consult with the person who lacks capacity.

9.14 The person may have also recorded preferences for the way care should be delivered to them and where in an advance statement or a Statement of Preferred Place of Care. These should be taken as indications of a person's wishes though in themselves, they are not legally binding.

9.15 The Decision Maker also needs to record the person's cultural identity and beliefs as they relate to the decision in question and reference any supporting evidence.

9.16 The Decision Maker should also record any other factor that would be relevant to a best interests decision. These may have been identified through the consultations.

9.17 The Decision Maker also needs to record the findings of the IMCA report (if the IMCA service has been appointed). Remember the IMCA is not the Decision Maker.

9.18 Chapter 5 of the Code of Practice provides clarification on the Best Interests Check list and what should be considered when making a decision in a person's best interests. It is not exhaustive and there may be other factors that do not appear in the checklist that need to be considered.

Best Interests Decisions

9.19 The Decision Maker must defer the decision to an Attorney or Court Appointed Deputy that has the legal authority to make the decision (See section 6).

9.20 Usually it is up to the Local Authority to decide what services should be offered, and then up to the service user to decide among the options available. When a person lacks capacity to make that decision this means that the Decision Maker makes the decision in best interests from the available options. Lack of capacity should not be a basis to argue that more options should be made available than would otherwise have been the case. Though the issues can blur in practice, in principle any challenge to a public body decision on resource allocation or options being offered should be brought through Judicial review which is a very high hurdle to overcome, and not through the Court of Protection disguised as a "best interests" decision (see *Chatting v Viridian*; *AVS v An NHS Foundation Trust*).

9.21 The Decision Maker should record the available options and identify the pros, cons and risks associated with each. This 'balance sheet' approach clearly records options that have been considered and what the possible positive and negative outcomes for the person would be. This is important as it clearly demonstrates the thinking that has gone into making a decision and supports defensible decision making.

9.22 The Decision Maker should record the best interest decision and the reason why that decision most corresponds to the wishes, feelings, and beliefs of the person who lacks capacity.

9.23 The fifth Statutory Principle requires the decision-maker to consider lesser restrictive options. In deciding best interests the Decision Maker must consider if there is a less restrictive way to achieve the person's best interests but does not automatically have to decide on the least restrictive option overall. This is because the least restrictive option might not be the one that is in the person's best interests.

9.24 If the IMCA service has been appointed, the Decision Maker must record how the decision relates to the findings within the IMCA report. The Decision Maker is also expected to inform the IMCA service of the decision.

9.25 What if there is disagreement about what is in a person's Best Interests? In some cases there may be a lack of consensus between the Decision Maker and a third party such as a relative or another professional as to what is in a person's best interests. If the decision is contentious or complex it may be advisable to consult other professionals and family members, or to hold a Best

Interests Meeting so that everyone has an opportunity to share their views and concerns. This will support the Decision Maker in reaching a decision that is in the person's best interests. Chapter 15 of the Code of Practice suggests ways in which disputes can be resolved. In circumstances where all attempts at arbitration have failed and consensus cannot be reached the Court of Protection can be approached to make the decision as to what is in the person's best interests.

9.26 The decision-maker should communicate the decision to those consulted.

10. Independent Mental Capacity Advocates

10.1 There is a statutory duty to appoint an Independent Mental Capacity Advocate in certain circumstances. A referral should be made to the organisation that Lincolnshire County Council is commissioning the service from. To fulfil the criteria:

- The decision must be about: Serious Medical Treatment or Long Term Accommodation Change

And

- The person must: Lack capacity and be 'un-befriended'. This means that the person has no friends or family and there is no one other than paid carers who can be consulted about what is in their best interests. Sometimes it may be appropriate if family members indicate that they do not want to be involved in the consultation, or if there are Adult Safeguarding issues which indicate that their involvement would not be appropriate or an independent view is needed.

10.2 There is also discretion to make a referral to the IMCA service when an Adult Safeguarding issue involves a person who lacks capacity, whether the person is the abused or the alleged abuser.

10.3 Regulations made under the Mental Capacity Act also state that IMCAs may be involved in a care review where the user of the service lacks capacity and is 'un-befriended' as there is no one else appropriate to consult.

For guidance see: Mental Capacity Act 2005 Sections 36 - 41 and Mental Capacity Act 2005 Code of Practice Chapter 10

11. Unwise Decisions, Duty of Care and Inherent Jurisdiction

11.1 If the person has been assessed as having capacity then the third statutory principle states that they can make an unwise decision.

11.2 Where there are concerns about the person's welfare and wellbeing the Local Authority can and should continue to offer support or services and attempt to engage with the person. It is crucial to remember that the Local Authority still has a duty of care to that person.

11.3 If the level of risk to the person who has capacity is of concern to the Local Authority an application can be made to the High Court for assurance of the assessment that they have capacity to make the unwise decision. The High Court is able to intervene using the "inherent jurisdiction" in cases where it is appropriate to protect someone despite them having capacity for a particular decision – see *DL v Leeds City Council* (2010) EWHC 2675 (Fam).

12. The role of the Court of Protection

8.1 Section 45 of the Mental Capacity Act set up a specialist court, the Court of Protection, to deal with decision-making for adults (and children in a few cases) who may lack capacity to make specific decisions for themselves. The new Court of Protection replaced the old court of the same name, which only dealt with decisions about the property and financial affairs of people lacking capacity to manage their own affairs. As well as property and affairs, the new court also deals with serious decisions affecting healthcare and personal welfare matters. These were previously dealt with by the High Court under its inherent jurisdiction.

8.2 The new Court of Protection is a superior court of record and is able to establish precedent (it can set examples for future cases) and build up expertise in all issues related to lack of capacity. It has the same powers, rights, privileges and authority as the High Court. When reaching any decision, the court must apply all the statutory principles set out in section 1 of the Act. In particular, it must make a decision in the best interests of the person who lacks capacity to make the specific decision.

8.3 The Court of Protection has powers to:

- decide whether a person has capacity to make a particular decision for themselves
- make declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make such decisions
- appoint deputies to make decisions for people lacking capacity to make those decisions
- decide whether an LPA or EPA is valid, and
- remove deputies or attorneys who fail to carry out their duties.

8.4 Where a person lacks capacity and a consensus cannot be reached about what is in their best interests the Local Authority can make an application to the Court of Protection to ask the Court to decide on what should happen. This takes the form of a Court Order.

8.5 Where a person lacks capacity and the Local Authority is aware that supporting their autonomy and best interests would involve considerable risk to the person it is possible to make an application to the Court of Protection to ask it to make a judgement as to if this would be acceptable. In this way a Local Authority could be assured that they had the ratification of their Court of Protection and be empowered to make decisions that potentially involved significant risk to the person.

12. Glossary of terms

Advance Decision to Refuse Treatment - A decision made to refuse specified medical treatment in advance of the time when a person may lack capacity to refuse. Specific regulations apply to advance decisions to refuse life sustaining treatment. For information see the Mental Capacity Act Code of Practice Chapter 9.

Advance Statement - A person may request preferences for their treatment and care. Such requests should be taken as strong indications of a person's wishes though they are not legally binding.

Adult Safeguarding - Procedures devised by local authorities along with other relevant agencies, to investigate allegations of abuse or ill treatment of vulnerable adults. Section 44 of the Mental Capacity Act 2005 introduces the Criminal Offence of Ill Treatment or Neglect.

Appointee - Someone appointed under Social Security Regulations to claim and collect social security benefits or pensions on behalf of a person who lacks the capacity to manage their own benefits.

Attorney - Someone appointed under either Enduring Power of Attorney (EPA) or Lasting Power of Attorney (LPA) to have the legal authority to make decisions within the scope of the arrangement on behalf on the person (donor) who lacks capacity.

Best Interests - Any Decision made, or anything done for a person who lacks capacity to make specific decisions, must be in a person's best interests. There are standard minimum steps that must be followed when working out someone's best interests. These are set out in section 4 of the Mental Capacity Act.

Capacity - The ability to make a decision about a particular matter at the time the decision needs to be made. The legal definition of a person who lacks capacity is set out in section 2 of the Mental Capacity Act.

Court of Protection - The specialist Court for all issues relating to people who lack capacity to make specific decisions. The Court of Protection has the same powers and authority as the High Court and it is therefore able to set precedents in relation to mental capacity.

Court of Protection Visitor - Appointed to report to the Court of Protection on how attorneys or deputies are carrying out their duties.

Decision Maker - In the Code of Practice (5.8), a person making a decision on behalf of someone who lacks the capacity to make the decision themselves, is referred to as the 'Decision Maker'. It is the Decision Maker's responsibility to work out what would be in the best interests of the person who lacks capacity. The Decision Maker is defined by the decision and is the person who is responsible for making the decision on behalf of the person if it is assessed that they lack capacity.

Deputy - Someone appointed by the Court of Protection with ongoing authority as prescribed by the Court to make decisions on behalf of a person who lacks capacity to make particular decisions as set out in Section 16(2) of the Mental Capacity Act.

Donee – is an individual named by a person when they have capacity; to represent them at times when they lack capacity.

Donor – an individual who at the time has capacity to delegate decisions regarding their welfare or property and finance to a nominated person known as a Lasting Power of Attorney

Enduring Power of Attorney - A Power of Attorney created under the Enduring Powers of Attorney Act 1985 appointing an attorney to deal with the Donor's property and affairs. Existing EPAs will continue to operate under the MCA. A person does not have to lack capacity for the attorney to make decisions on their behalf. They must be registered with the Office of the Public Guardian if the person who is the subject of the EPA loses capacity.

Independent Mental Capacity Advocate (IMCA) – Advocates created by the legislation who must be involved to help particularly vulnerable people who lack capacity to make important decisions about serious medical treatment or changes in accommodation and who have no one else appropriate to consult about these decisions.

Inherent jurisdiction is - A doctrine of the English common law that a superior court has the jurisdiction to hear any matter that comes before it, unless a statute or rule limits that authority or grants exclusive jurisdiction to some other court or tribunal.

Lasting Powers of Attorney – Two new types of Power of Attorney created under the Mental Capacity Act (Section 9(1)) appointing an attorney to make decisions about the Donor's Personal Welfare (including healthcare) or deal with the Donor's Property and Affairs. Different people may hold different powers. For example an accountant may be LPA for Property and Affairs and a family member for Personal welfare. You can have one and not the other. There may be several family members appointed.

Office of the Public Guardian - The Public Guardian is an officer established under section 57 of the Mental Capacity Act. The Public Guardian is supported by the Office of the Public Guardian, which will supervise Deputies, keep a register of Deputies, LPAs and EPAs, and investigate any complaints or Adult Safeguarding concerns about Attorneys or Deputies. The OPG replaces the Public Guardianship Office (PGO) that was been in existence for many years.

Personal Welfare - Personal welfare decisions are any decisions about a person's healthcare, where they live, what clothes they wear, what they eat and anything needed for their general care and well-being. Attorneys and Deputies can be appointed to make decisions about personal welfare on behalf of a person who lacks capacity. Many acts of care are to do with personal welfare.

Property and Affairs - Any possessions owned by a person (such as house or flat, jewellery or other possessions), the money that they have in income, savings or investments and any expenditure. Attorneys and deputies can be appointed to make decisions about property and affairs on behalf of a person who lacks capacity.

Receiver - Someone appointed by the former Court of Protection to manage the property and affairs of a person lacking the capacity to do so. Existing receivers continue as deputies with legal authority to deal with the person's property and affairs.

Restraint - The use or threat of force to help do an act that the person resists, or the restriction of the person's liberty of movement, whether or not they resist. Restraint may only be used where it is necessary to protect the person from harm and is proportionate to the risk of harm.

Statement of Preferred Place of Care - A patient-held care plan for people with life limiting illness who wish to have their choices and preferences recorded in relation to their care and ultimate place of death. A Statement of Preferred Place of Care should be taken as an indication of a person's requests. While not legally binding, every effort should be made to follow it.

Two Stage test - Using sections 2 and 3 of the Act to assess whether or not a person has the capacity to make a particular decision for themselves at time the decision is required.

Appendix 1 Mental Capacity Act 2005 Practice Standard

Standard 7

It is clearly demonstrated that the legal requirements of the Mental Capacity Act 2005 (MCA) have been adhered to.

- The MCA is considered at all key stages of the assessment, planning and reviewing processes.
- There is written evidence that the worker has considered the person's capacity and any factors that may affect this.
- That where appropriate the worker has recorded a capacity assessment and best interest checklist.
- That the decision the capacity assessment relates to is clearly defined.
- The decision-maker is clearly identified.
- That the assessment is robust and will stand up to legal scrutiny.
- That where appropriate the worker has involved other professionals in assessing capacity.
- The worker has identified existing LPAs / Court Orders and obtained copies of the documentation to confirm scope of authority.
- The Deprivation of Liberty Safeguards have been considered where appropriate.
- Appropriate use of IMCAs and advocacy and support can be evidenced.
- Inherent Jurisdiction has been addressed where appropriate.

Audit Question 7

Is it clearly demonstrated that the legal requirements of the Mental Capacity Act 2005 (MCA) have been adhered to, and are mental capacity issues fully addressed?

Additional Guidance:

Where the assessment identifies that the person may have an impairment of the mind or brain, or there is some sort of disturbance affecting the way their mind or brain works, the worker should assess the person's capacity using the two stage test and record this on the standard LCC form. These must be treated as decision and time specific – they cannot be undertaken retrospectively and cannot be rectified if they are missing on file. Assessments can be accompanied by mental health or other specialist assessments. Capacity assessments should be recorded for:

- Consent to the assessment taking place
- Capacity to contribute to the care planning process
- Capacity to make specific decisions, such as a change of accommodation
- Capacity to consent to a particular aspect of care or case management. For example admission to care, moving and handling care plans, Telecare.

When the person is assessed as lacking capacity it should be identified if there is a person who has an LPA or there is a Court Appointed Deputy the scope of whose authority covers the decision that needs to be made. Where the decision making is delegated to an LPA Attorney or a Court Appointed Deputy the worker must record that they have demonstrated that they are acting in the person's best interests and if there is concern, this is a potential Safeguarding issue. In this event the worker must demonstrate that appropriate action has been taken, for example a safeguarding referral to the Safeguarding Team and the OPG.

- The client's record should include evidence of the LPA or Court Order – that it is known to exist, that staff are satisfied that it applies to the decisions being made (i.e. financial and property, or health and wellbeing), that it does not exclude certain decisions and that it is registered. A copy of the LPA / Court Order should be kept on file.

- Even with an LPA / Court Order in place there should be evidence on file that everything possible has been done to help the person make the decision.

Where a Best Interest decision is required the worker should use the Best Interest Checklist as a prompt to ensure compliance with the MCA. There is a duty to consult all involved, including family and clearly record their views.

Deprivation of Liberty Safeguards (DoLS)

The worker must demonstrate that where a person has been assessed as lacking capacity to consent to an admission to a care home that where practicable a Best Interest meeting has been held and that the best interest process followed. That where a person is assessed as lacking capacity and objects to a planned placement from the community or on hospital discharge, or there is opposition from family or friends a DoLS has been considered and the DoLS Team contacted for advice where appropriate.

The DoLS do not apply to community settings however the worker must demonstrate that where there are significant restrictions being placed on a person who lacks capacity that would have the effect of depriving them of their liberty that an application has been made to the Court of Protection. (See DoLS Code of Practice para: 1.20).

Instructing and consulting an Independent Mental Capacity Advocate

The worker must demonstrate that appropriate IMCA referrals have been made. An IMCA must be instructed, and then consulted, for people lacking capacity who have no-one else to support them (other than paid staff), whenever:

- an NHS body is proposing to provide serious medical treatment, or
- an NHS body or local authority is proposing to arrange accommodation (or a change of accommodation) in hospital or a care home, and
- the person will stay in hospital longer than 28 days, or
- they will stay in the care home for more than eight weeks

The Code of Practice states that an IMCA may be instructed to support someone who lacks capacity to make decisions concerning the following, and it is good practice for this to be evidenced by the worker also:

- care reviews, where no-one else is available to be consulted
- adult protection cases, whether or not family, friends or others are involved

Inherent Jurisdiction

That where a person has been assessed as having capacity but where they are a vulnerable adult and under duress and / or undue influence from a third party that the worker has documented this and taken appropriate action, for example a referral to Safeguarding.

Appendix 2: Form 1 Mental Capacity Assessment

Mental Capacity Assessment

This form has been developed to support your compliance with the Mental Capacity Act 2005. There is a statutory requirement for anyone undertaking an assessment to have regard to the Code of Practice for the Mental Capacity Act which can be accessed via this link to the Adult Social Care Manual.

http://www.proceduresonline.com/lincolnshire/adultsc/chapters/g_legislation.html#code_practice

References given below refer to the relevant paragraphs of the MCA Code.

1.1 Service user details

Name:

Date of Birth:

Case/Ref:

Present Address/Location:

Home Address (if Different):

1.2 What is the specific decision relevant to this capacity assessment?

The MCA Code paragraph 4.4 states '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.'

Details:

1.3 Who should carry out the capacity assessment? See 4.38 to 4.43 of the Code.

Where the service user is subject to multi-disciplinary care, the professional with greatest responsibility for the specific decision is known as the 'decision-maker' and should ideally assess capacity. Where this is in doubt agreement should be sought within the multidisciplinary team. If it is evidenced that a specialist capacity assessment (such as by a psychologist) is needed and which is being relied on for this decision the decision-maker must be satisfied that this assessment is fit for purpose.

Person undertaking this assessment of capacity

Name:

Role:

Organisation:

Tel:

Email:

Address:

1.4 Have you been supported to carry out the capacity assessment by another person or professional?

Yes

No

(If yes, give details of person/s below)

Name	Profession	Relationship to Person	Contact details
<input type="text" value="Click here to enter text."/>	<input type="text" value="Click here to enter text."/>	<input type="text" value="Click here to enter text."/>	<input type="text" value="Click here to enter text."/>
<input type="text" value="Click here to enter text."/>	<input type="text" value="Click here to enter text."/>	<input type="text" value="Click here to enter text."/>	<input type="text" value="Click here to enter text."/>

1.5 Identify the Decision Maker. See 5.8 of the Code.

The decision maker will be the person or professional who is responsible for making the decision you have identified, or undertaking the action on behalf of the person if it established that they lack capacity unless there is a valid and applicable Enduring Power of Attorney, Lasting Power of Attorney or Court Appointed Deputy then the Attorney or Deputy will be the decision-maker for the decision if it is within the scope of their authority.

Note: You must verify the authority before the Attorney or Deputy can be permitted to act as decision-maker.

Is there an Enduring Power of Attorney (EPA) under previous legislation? Yes No

EPAs only cover property and finance and not personal welfare decisions or Continuing Health Care decisions. EPA has been replaced by Lasting Powers of Attorney. They can still be used if they were made and signed before October 2007. The EPA must be registered with the Office of the Public Guardian if the donor is losing, or has lost the capacity to make decisions.

Is there a registered Property & Affairs Lasting Power of Attorney? Yes No

This covers property and finance and not personal welfare or Continuing Health Care decisions. An LPA cannot be used until it has been registered by the Office of the Public Guardian.

Is there a registered Personal Welfare Lasting Power of Attorney? Yes No

This covers personal welfare decisions, which includes Continuing Health Care decisions. An LPA cannot be used until it has been registered by the Office of the Public Guardian.

Is there a Court Appointed Deputy for Property and Affairs? Yes No

This covers property and finance and not personal welfare or Continuing Health Care decisions.

Is there a Court Appointed Deputy for Health and Welfare? Yes No

This covers personal welfare decisions, which includes Continuing Health Care decisions.

Does the Attorney/Deputy have the authority to make this decision?

You must check the paperwork to verify that the authority of the Attorney or Deputy has not been restricted by the person or the Court and that it covers this decision and that it is valid and applicable.

Yes No

Give details and verify you have seen the original:

Contact details of named Attorney/Deputy:

For more information on Lasting Powers of Attorney and Court Appointed Deputies see chapters 7 and 8 of the Code

Clearly identify who is the named decision maker for this decision if the person is assessed as lacking capacity.

Name:

Role: Organisation:

Tel: Email:

Address:

1.6 This section evidences your compliance with Statutory 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.'
See MCA Code 2.6 to 2.9.

Consider first what kind of help and support you can give the person to help them understand, retain and weigh up information and communicate their decision.

See MCA Code 3.13 Have you discussed with the person and/or appropriate others the most suitable venue for the assessment? Does the person feel more comfortable in their own room? Does it need to be quiet?

Describe: [Click here to enter text.](#)

See MCA Code 3.14 Have you discussed with the person and/or appropriate others to establish timing of assessment? Is there a time of day that is better for the person? Would it help to have a particular person present?

Describe: [Click here to enter text.](#)

See MCA Code 3.11 Does the person have any language/communication issues?

Describe: [Click here to enter text.](#)

How have you addressed these (including non-verbal communication and other specialist resources)?

Describe: [Click here to enter text.](#)

What other steps have you taken to help communication?

Describe: [Click here to enter text.](#)

See MCA Code 3.7 Have you provided all the information the person needs to make an informed decision? The assessor must ensure that the person has:

- a) sufficiently detailed alternative plans explained to them to allow them to weigh up the alternatives and make an informed choice where possible
- b) discussion facilitated by the assessor to explore the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision

Summarise details of the options you have discussed: [Click here to enter text.](#)

1.7 Assessment of Capacity – MCA Code - Chapter 4

When completing the assessment remember the following prompt to good recording practice.

Who is it about? What happened? When did it take place? Where did it take place? Why did it happen? Each question should have a factual answer. Importantly, none of these questions can be answered with a simple "yes" or "no" and you are asked to describe the process.

Two Stage Capacity Assessment:

Stage 1. Is there an impairment of, or disturbance in, the functioning of the person's mind or brain?

Yes

No

Describe: [Click here to enter text.](#)

Capacity should be assessed at the time the decision needs to be made. Consider whether this decision can be delayed because the person is likely to regain or develop capacity.

- The decision can be delayed
- Not appropriate to delay the decision
- Person not likely to gain or develop capacity

Stage 2

Can the person understand the information relevant to the decision?

- Yes
- No

Describe how you assessed this: [Click here to enter text.](#)

Can they retain that information long enough to make the decision?

- Yes
- No

Describe how you assessed this: [Click here to enter text.](#)

Can they use or weigh up that information as part of the process of making the decision?

- Yes
- No

Describe how you assessed this: [Click here to enter text.](#)

Can they communicate their decision, by any means available to them?

- Yes
- No

Describe the reasons for your conclusion: [Click here to enter text.](#)

If the answer to any of these 4 questions is NO, the person lacks the capacity to make the decision.

1.8 Impaired decisions based on duress and undue influence

A person who has mental capacity to make decisions may have their ability to give free and true consent impaired if they are under constraint, coercion or undue influence. Duress and undue influence may be affected by eroded confidence due to fear of reprisal or abandonment, sense of obligation, cultural factors, power relationships.

Describe any concerns: [Click here to enter text.](#)

1.9 Determination of Capacity

I have assessed this person's capacity to make the specific decision and determined that they have the capacity to make this decision at this time.

Name

Signature

Date

I have assessed this person's capacity to make the specific decision and determined that they do not have the capacity to make this decision at this time

Name

Signature

Date

What to do now

If on completing Form 1 - Mental Capacity Assessment it is concluded that the person does not have capacity and the decision cannot be delayed, the decision maker will proceed to make a best interests decision. This should be recorded on Form 2 - Best Interest Decision Making Checklist.

Appendix 3: Form 2 Best Interest Decision Making Checklist

Best Interest Decision Making Checklist

This form has been developed to support your compliance with the Mental Capacity Act 2005. There is a statutory requirement for anyone making a best interest decision to have regard to the Code of Practice for the Mental Capacity Act which can be accessed via this link to the Adult Social Care Manual.

http://www.proceduresonline.com/lincolnshire/adultsc/chapters/g_legislation.html#code_practice

References given below refer to the relevant paragraphs of the MCA Code.

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 chapter 5 of the MCA Code and states that: '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.'

This principle covers all aspects of financial, personal welfare and healthcare decision-making and actions. Certain decisions are excluded because they are either so personal to the individual concerned, or governed by other legislation and include consenting to marriage and consenting to have sexual relations. For full details see 1.8 to 1.11 of the Code.

1.1 Service user details

Name:

Date of Birth:

Case/Ref:

Present Address/Location:

Home Address (if different):

1.2 Person completing this form

Name:

Role:

Organisation:

Tel:

Email:

Address:

1.3 State the specific decision relevant to this best interest checklist (see 1.2 of Mental Capacity Assessment)

Details:

**1.4 The MCA Code 5.3 states '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'. Confirm that a capacity assessment has established the person lacks capacity to make this decision, if not you cannot proceed with a best interests decision.
(See 1.9 of Form 1 Mental Capacity Assessment)**

<input type="checkbox"/> Yes	<input type="checkbox"/> No	Date: <input type="text" value="Click here to enter text."/>
Undertaken by:		
Name: <input type="text" value="Click here to enter text."/>	Profession: <input type="text" value="Click here to enter text."/>	
Relationship to person: <input type="text" value="Click here to enter text."/>		
Tel: <input type="text" value="Click here to enter text."/>	Email: <input type="text" value="Click here to enter text."/>	
Address: <input type="text" value="Click here to enter text."/>		

**1.5 Clearly identify who is the named decision maker for this Best Interest Decision
(See 1.5 of Form 1 Mental Capacity Assessment)**

Name: <input type="text" value="Click here to enter text."/>	Profession: <input type="text" value="Click here to enter text."/>
Tel: <input type="text" value="Click here to enter text."/>	Email: <input type="text" value="Click here to enter text."/>
Address: <input type="text" value="Click here to enter text."/>	

**Chapter 5 of the MCA Code details what you should take into account when working out someone's best interests. As every case – and every decision – is different, the law can't set out all the factors you should consider, however, it sets out some common factors which must always be considered.
These factors are summarised in a checklist which this form will now prompt you to work through.**

**1.6 Best interests consultation – Record your consultation with the Service User.
See 5.21 to 5.24 and 5.37to 5.48 of the Code**

What are the issues that are most relevant to the person who lacks capacity?
Describe: <input type="text" value="Click here to enter text."/>
Specify their past and present wishes, feelings and concerns in relation to this decision.
Describe: <input type="text" value="Click here to enter text."/>
What are their values and beliefs (eg. religious, cultural, moral) in relation to this decision?
Describe: <input type="text" value="Click here to enter text."/>
Are there any other "relevant circumstances" that should be taken into account in this case?
Describe: <input type="text" value="Click here to enter text."/>

Is there a relevant advanced statement?

Give detail: [Click here to enter text.](#)

A person may have previously recorded preferences for their future care. Such requests should be taken into account as strong indications of a person's wishes though they are not legally binding.

1.7 Use this section to record who is involved in the consultation.

See 5.49 to 5.55 of the Code. You must include anyone named by the person lacking capacity as someone to be consulted, another professional, and where appropriate anyone engaged in caring for the person or interested in their welfare, any attorney or Court Appointed Deputy, other relevant person.

Name: [Click here to enter text.](#)

Relationship to person: [Click here to enter text.](#)

Date Consultation was Undertaken: [Click here to enter text.](#)

What do they consider to be in the person's best interests on the matter in question?

[Click here to enter text.](#)

Do they have any information about the person's wishes, feelings, values or beliefs in relation to this matter?

[Click here to enter text.](#)

Name: [Click here to enter text.](#)

Relationship to person: [Click here to enter text.](#)

Date Consultation was Undertaken: [Click here to enter text.](#)

What do they consider to be in the person's best interests on the matter in question?

[Click here to enter text.](#)

Do they have any information about the person's wishes, feelings, values or beliefs in relation to this matter?

[Click here to enter text.](#)

Name: [Click here to enter text.](#)

Relationship to person: [Click here to enter text.](#)

Date Consultation was Undertaken: [Click here to enter text.](#)

What do they consider to be in the person's best interests on the matter in question?

[Click here to enter text.](#)

Do they have any information about the person's wishes, feelings, values or beliefs in relation to this matter?

[Click here to enter text.](#)

Name: [Click here to enter text.](#)

Relationship to person: [Click here to enter text.](#)

Date Consultation was Undertaken: [Click here to enter text.](#)

What do they consider to be in the person's best interests on the matter in question?

[Click here to enter text.](#)

Do they have any information about the person's wishes, feelings, values or beliefs in relation to this matter?

[Click here to enter text.](#)

1.8 Independent Mental Capacity Advocate (IMCA) Involvement

Where the person lacking capacity has nobody that can be consulted other than paid carers and professionals, and faces a decision about serious medical treatment or a change of residence, the law requires you to ensure an IMCA is appointed. You also have discretion to refer the person for an IMCA if this decision relates to a safeguarding concern or a care review. The role of the IMCA is to facilitate the decision making process they are not the decision-maker. See chapter 10 of the MCA Code.

Referral to IMCA service made?

Yes

No

Date:

Name of appointed IMCA:

Organisation:

Tel:

Email:

Address:

Name:

Date Consultation was Undertaken:

What do they consider to be in the person's best interests on the matter in question?

Do they have any information about the person's wishes, feelings, values or beliefs in relation to this matter?

1.9 Best interests decision – Balance sheet approach. Specify the different options that are being considered. In deciding best interests you must explore if there is a less restrictive way to achieve what is in the person's best interests but you do not automatically have to take whatever is the least restrictive option overall. This is because the least restrictive option might not be the one that is in the person's best interests.

Option One. Describe:

Benefits for the person:

Risks for the person:

Can this be achieved in a less restrictive way?:

Option Two. Describe:

Benefits for the person:

Risks for the person:

Can this be achieved in a less restrictive way?:

Option Three. Describe: [Click here to enter text.](#)

Benefits for the person: [Click here to enter text.](#)

Risks for the person: [Click here to enter text.](#)

Can this be achieved in a less restrictive way?: [Click here to enter text.](#)

Option Four. Describe: [Click here to enter text.](#)

Benefits for the person: [Click here to enter text.](#)

Risks for the person: [Click here to enter text.](#)

Can this be achieved in a less restrictive way?: [Click here to enter text.](#)

1.10 Additional information considered by the decision maker in making the best interests decision specified.

Details: [Click here to enter text.](#)

1.11 Final Decision. Give the reasons why this option has been selected and why other options have been rejected.

Details: [Click here to enter text.](#)

1.12 Objections.

See 5.63 to 5.69 of the Code

Record here if anyone disagrees with the decision that has been made and how you intend to proceed.

Details: [Click here to enter text.](#)

1.13 Best interests decision – Risk assessment. If you have identified specific risks, consider if you need to complete a specialist risk assessment tool

Specialist risk assessment tool completed?

Yes

No

Date Completed: [Click here to enter text.](#)

Completed by: [Click here to enter text.](#)

1.14 Deprivation of Liberty.

Article 5 of the European Convention on Human Rights provides that everyone has the right to liberty and security of person.

This section helps to highlight if the person might be being deprived of their liberty.

Does this decision involve the person staying in a care home or hospital? If so:

Is the person repeatedly asking or trying to leave? Is the person agitated? Is sedation being used regularly?

Are there restrictions on friends and family visiting? Yes No

Is there disagreement with the person's friends and family about the placement / hospital admission and what is in the person's best interests? Yes No

If you have answered 'Yes' to any of these questions the Deprivation of Liberty Safeguards (DoLS) may apply and you must seek advice by contacting the Deprivation of Liberty Safeguards Team on 01522 554205. If the person is living in the community and you are concerned the restrictions in place may amount to a deprivation the DoLS do not apply and any deprivation would need to be authorised by another legal process and you should seek legal advice.

Decision Maker:

Date: