

Capacity

If there is a concern that the individual may not have capacity to give consent to a physical intervention/examination as part of the NHS Continuing Healthcare assessment process or the sharing of personal data with family, friends, advocates, and/or other representatives, this should be determined in accordance with the Mental Capacity Act 2005 and the associated code of practice.

ICBs should be particularly aware of the five principles of the Act:

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

It is important to be aware that just because an individual may have difficulty in expressing their views or understanding some information, this does not in itself mean that they lack capacity to make the decision in question. Appropriate support and adjustments, for example, using alternative methods of communication, should be made available to the person in compliance with the Mental Capacity Act 2005, and with disability discrimination legislation.

ICBs and local authorities should ensure that all staff involved in NHS Continuing Healthcare assessments are appropriately trained in Mental Capacity Act 2005 principles and responsibilities. Where the assessor is not familiar with Mental Capacity Act principles and the person appears to lack the relevant capacity, the assessor should consult their employing organisation and ensure that appropriate actions are identified (refer to Practice Guidance note 8-10 for more information).

(National Framework 2022: Paragraphs 86-88).

Best Interests Decisions

Physical intervention or examination, and care and treatment

If the person lacks the relevant capacity to either give or refuse consent to a physical intervention/examination as part of the NHS Continuing Healthcare assessment process, in order to proceed with the physical intervention/examination, a 'best interests' decision should be made. The 'best interests' decision should be recorded. The person leading the assessment is responsible for making this decision and should bear in mind the expectation that everyone who is potentially eligible for NHS Continuing Healthcare should have the opportunity to be considered for eligibility. A third party cannot give or refuse consent for any physical intervention/examination, on behalf of a person who lacks the relevant capacity, unless they have a valid and applicable Lasting Power of Attorney (Health and Welfare) or they have been appointed as a Deputy (Health and Welfare) by the Court of Protection in which case they will need to make the 'best interests' decision.

If the person lacks the relevant capacity to either give or refuse consent to the care and treatment provided as part of NHS Continuing Healthcare, in order to proceed with the care and treatment, a 'best interests' decision should be made. The 'best interests' decision should be recorded. The person leading the assessment is responsible for making this decision and should bear in mind the expectation that everyone who is potentially eligible for NHS Continuing Healthcare should have the opportunity to be considered for eligibility and receive appropriate care and treatment to meet their assessed needs. A third party cannot give or refuse consent for care and treatment, on behalf of a person who lacks the relevant capacity, unless they have a valid and applicable Lasting Power of Attorney (Health and Welfare) or they have been appointed as a Deputy (Health and Welfare) by the Court of Protection in which case they will need to make the 'best interests' decision.

(National Framework 2022: Paragraphs 89-90).

Processing an individual's personal data

Personal information may only be shared with third parties other than health and social care professionals (e.g., family, friends, advocates, and/or other representatives) if the individual has given their explicit consent (see paragraphs 80-84 above) or where it is necessary to share it to protect the vital interests of the individual or another person.

If the person lacks the relevant capacity to either give or refuse consent to the sharing of personal data with a family member, friend, advocate, and/or other representative, in order to proceed with the sharing of information, a 'best interests' decision should be made. The 'best interests' decision should be recorded. The person leading the assessment is responsible for making this decision and should bear in mind the expectation that everyone who is potentially eligible for NHS Continuing Healthcare should have the opportunity to be considered for eligibility. A third party cannot give or refuse consent for sharing personal data with third parties other than health and social care professionals, on behalf of a person who lacks the relevant capacity, unless they have a valid and applicable Lasting Power of Attorney (Health and Welfare) or they have been appointed as a Deputy (Health and Welfare) by the Court of Protection in which case they will need to make the 'best interests' decision.

(National Framework 2022: Paragraphs 91-92).

General Principles

If someone states that they have such authority the assessor should request sight of a certified copy of the original Deputyship Order or registered Lasting Power of Attorney and check the wording of the order to confirm that the person does have the relevant authority stated.

Where a 'best interests' decision needs to be made, the 'decision-maker' must take into account the views of others including anyone engaged in caring for the person or interested in the individual's welfare (if it is practicable and appropriate to consult them), as set out in Section 4(7) of the Mental Capacity Act 2005. The decision-maker should be mindful of the need to respect confidentiality.

Although the decision-maker must take account of the views of relevant third parties, those consulted (including family members) do not have the authority to consent to or refuse consent to the actions proposed as a result of the 'best interests' process. The responsibility for the decision rests with the decision maker, not with those consulted. Where there is a difference of opinion between the decision-maker and those consulted, every effort should be made to resolve this informally. However, this process should not unduly delay timely decisions being made in the person's best interests. An individual's capacity to make certain decisions may fluctuate, and there may be circumstances where an individual presents with a temporary loss of decision-making capacity. In these circumstances a decision needs to be made as to whether the 'best interests' decision should be delayed to give the person time to regain the relevant capacity. In these circumstances, the relevant body should decide whether to provide an interim care or support package.

(National Framework 2022: Paragraphs 93-96).

References

[Mental-capacity-act-code-of-practice.pdf \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/108142/mental-capacity-act-code-of-practice.pdf)

[Office of the Public Guardian – GOV.UK \(www.gov.uk\)](https://www.gov.uk)

[National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care - July 2022 \(Revised\) \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/108142/national-framework-for-nhs-continuing-healthcare-and-nhs-funded-nursing-care-july-2022-revised.pdf)