

## Learning From Safeguarding Audits Best Interests Decision Making

This briefing summarises the findings and learning outcomes of a **SAB multi-agency audit** of Mental Capacity Act (MCA) best interests decision making in 2017.

**Background:** In October 2017 the East Sussex Safeguarding Adults Board (SAB) published the findings of a Safeguarding Adult Review (SAR), following the death of a 64 year old man (Adult A), who was living in a care home in East Sussex. One of the recommendations from the SAR was that the SAB should conduct an audit of cases to evaluate the outcomes of Mental Capacity Act (MCA) best interests decision-making, with particular reference to assessing multi-agency involvement and clarity about leadership responsibility.

All practitioners who work with adults with care and support needs are encouraged to read the briefing and discuss it with their managers and colleagues.

The audit was planned and conducted by the SAB Performance Quality & Audit (PQA) Subgroup. The multi-agency audit group comprised representatives of Adult Social Care & Health (ASCH), Sussex Partnership NHS Foundation Trust (SPFT), East Sussex Healthcare Trust (ESHT), East Sussex Clinical Commissioning Groups (CCGs), South East Coast Ambulance NHS Foundation Trust (SECamb) and Sussex Police. The audit looked at five cases involving adults, who had on one or more occasion been assessed as lacking capacity and where best interests decisions had been made on their behalf.

### The cases audited included

- A woman at risk of financial abuse and lacking capacity with regard to managing finances
- A man with autism and learning disability, lacking capacity to make decisions regarding surgery
- A woman living in a nursing home, assessed as lacking capacity to manage finances
- A woman in a mental health inpatient unit, lacking capacity to make decisions about moving to supported housing
- A man experiencing cognitive decline and lacking capacity to make decisions about discharge from hospital

In each case the audit considered how well the principles of the Mental Capacity Act were applied and reflected in the decision making process and how well leadership responsibilities were understood and applied.

### What is working well?

- ✓ In some cases professionals demonstrated a good understanding of the decision specific nature of assessments and the importance of providing additional support where necessary.
- ✓ In one case support was provided by a specialist Learning Disability Nurse which assisted the process considerably.
- ✓ There were good examples where other professionals and family members were consulted when best interests decisions were made.
- ✓ There were good examples of inter-agency working and communication but this was not evident in every case.

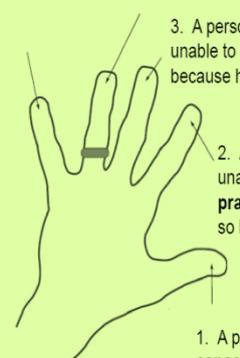
### What can we improve?

- Consistent application of the principles of the Mental Capacity Act when making assessments.
- Clarity about the decision to be made when making assessments – this was not always clear in the cases audited.
- Understanding the importance of multi-agency working and clear leadership. One case in particular would have benefited from a multi-agency meeting at an earlier stage.
- The way disagreements in relation to assessments are resolved. This will be developed as part of proposed multi-agency Mental Capacity Act procedures.
- Record-keeping and information sharing in relation to assessments and best interests decisions. In some cases more detail could have been recorded about how alternative options had been considered.
- Awareness of and referral to Advocacy Services.
- In one case there was a lack of communication with Primary Care by the agencies involved regarding safeguarding concerns and capacity issues.

## Mental Capacity Act assessments

The Mental Capacity Act (MCA) 2005 applies to everyone involved in the care, treatment and support of people aged 16 and over living in England and Wales who are unable to make all or some decisions for themselves. The MCA is designed to protect and restore power to those vulnerable people who lack capacity. The MCA also supports those who have capacity and choose to plan for their future – this is everyone in the general population who is over the age of 18. All professionals have a duty to comply with the Code of Practice. It also provides support and guidance for less formal carers. The Act's five statutory principles are the benchmark and must underpin all acts carried out and decisions taken in relation to the Act. (Social Care Institute For Excellence (SCIE) )

### MCA - Five Statutory Principles



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

scie social care institute for excellence

### Who can assess capacity?

**Anyone** caring for or supporting a person who may lack capacity could be involved in assessing capacity. Before deciding whether an individual has the capacity to make a particular decision you must answer two questions. (This is the 'two stage test').

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

**Stage 2.** Is the impairment or disturbance sufficient that the person lacks the capacity to make a particular decision?

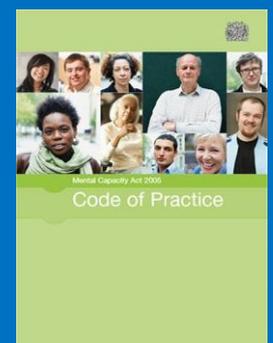
**The MCA says that a person is unable to make their own decision if they cannot do one or more of the following four things:**

- Understand information given to them
- retain that information long enough to be able to make the decision
- weigh up the information available to make the decision
- communicate their decision – this could be by talking, using sign language or even simple muscle movements such as blinking an eye or squeezing a hand.

Lack of capacity may not be a permanent condition. Assessments of capacity should be **time-specific and decision-specific**. You cannot decide that someone lacks capacity based upon age, appearance, condition or behaviour alone.

Mental capacity involves not only considering the person's ability to weigh up information and understand consequences of decisions and actions, but also the person's ability to **implement** those actions.

Detailed guidance including case studies is available in the [Mental Capacity Act Code of Practice](#).



## Making Best Interests Decisions

If a person has been assessed as lacking capacity then any action taken, or any decision made for or on behalf of that person, must be made in his or her best interests. The person who has to make the decision is known as the 'decision-maker' and normally will be the carer responsible for the day-to-day care, or a professional such as a doctor, nurse or social worker where decisions about treatment, care arrangements or accommodation need to be made.

**The audit demonstrated that best interests decisions are most effective when:**

- ✓ **There is clear leadership in the decision making process**
- ✓ **All relevant agencies are involved**
- ✓ **Clear, timely and accurate records are made**
- ✓ **The views of the person lacking capacity are sought and taken into account**

### How does the decision maker decide what is in the person's best interests?

- When making a best interests decision, you must always assess whether the person may regain capacity and, if so, if the decision can be put off until then.
- Avoid making assumptions based on a person's age, appearance, condition or behaviour.
- Do whatever is possible to encourage the person's participation to take part or improve their ability to take part, in making the decision.
- Identify all relevant circumstances.
- Encourage the person to participate in making the decision.
- As far as is reasonably possible, try to find out the person's views, including:
  - past and present wishes and feelings
  - beliefs and values (e.g. religious, cultural, moral or political)
  - any other factors the person would be likely to consider

### A best interests meeting should be held where:

- the decision is complex or controversial; or
- there is a range of options/issues that require the input of a number of different interested parties or
- there is a disagreement or dispute between the decision maker and the person, family members or other professionals

### When do I refer to an Independent Mental Capacity Advocate (IMCA)?

The role of the IMCA is to represent the person without capacity in discussions to work out whether the proposed decision is in the person's best interests. The service is a legal right for people over 16 who:

- Lack mental capacity (assessed) to make key decisions
- Do not have an appropriate family member or friend to represent their views

An IMCA **must** be involved if:

- the decision to be made is a decision about serious medical treatment or
- a long-term change of accommodation needs to be made

Where an adult lacks capacity in relation to their understanding of a safeguarding concern and their ability to consent to a safeguarding enquiry, consideration should be given to involving an IMCA if the adult has no one else suitable to support them.

The IMCA service in East Sussex is provided by POHWER. See their [website](#) to find out more about the services they provide, including how to make a referral. When [making a referral](#) you should provide as much information as possible including any immediate risks to the adult concerned which POHWER should be aware of.

### Who should be involved?



- the person assessed as lacking mental capacity
- any involved family members or friends
- the person responsible for implementing the decision
- key staff who currently care for the person
- any advocate who is involved including from the statutory IMCA service
- any professional who can contribute to the outcome of the best interests meeting
- anyone named by the person as someone to be consulted
- Any Lasting Power of Attorney or court-appointed deputy



**You must consider all options available**

**The decision should be an option that is less restrictive of the person's basic rights and freedoms – as long as it is still in their best interests.**

## Record keeping and information sharing

### Who needs to know?

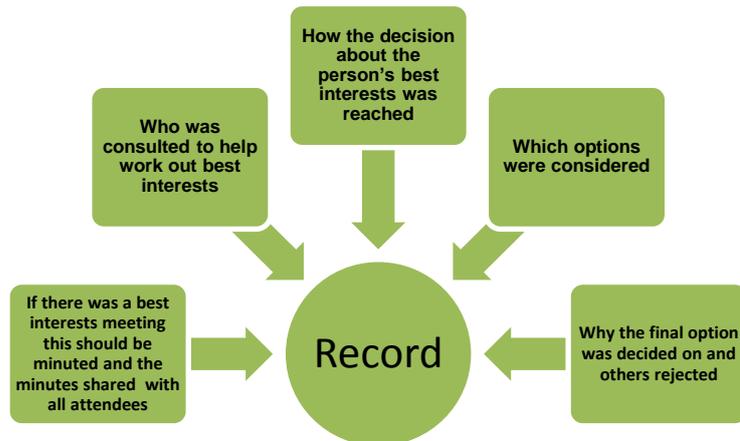
Clear, timely and accurate records of mental capacity assessment and best interests decisions should be made and shared with all of the parties involved.

You should also inform:

- ✓ Other agencies who could not attend a best interests meeting and may need to know about the decision e.g. the person's GP
- ✓ Any agencies who may need to know about the decision, for example a care home or other service responsible for ongoing care and support

If in doubt about who should be informed you should consult your manager.

### What should be recorded?



How should disputed decisions be managed?

If family, friends, carers or an IMCA disagree with the decision maker's best interests decision and the issue cannot be resolved, they should be referred to the Adult Social Care & Health complaints procedure.

If there is a major disagreement regarding a serious decision, for example, where someone should live, the decision maker should consider with their line manager the appropriateness of making an application to the [Court of Protection](#). You can only [apply to the court](#) if there's a major disagreement about a serious decision which can't be agreed any other way. There are general rules and examples in [the Mental Capacity Act Code of Practice](#).

## The Office of the Public Guardian and The Court of Protection

The [Office of the Public Guardian \(OPG\)](#) protects people who may lack the mental capacity to make certain decisions for themselves, such as about their health and wellbeing or finances. The OPG supervise people appointed by the Court of Protection to help manage someone's affairs where they've lost mental capacity. The OPG also helps people plan ahead so that someone they trust can make certain decisions for them if they lose capacity in the future

The [Court of Protection](#) is responsible for:

- deciding whether someone has the mental capacity to make a particular decision for themselves
- appointing deputies to make ongoing decisions for people who lack mental capacity
- giving people permission to make one-off decisions on behalf of someone else who lacks mental capacity
- handling urgent or emergency applications where a decision must be made on behalf of someone else without delay
- making decisions about a lasting power of attorney or enduring power of attorney and considering any objections to their registration
- considering applications to make statutory wills or gifts
- making decisions about when someone can be deprived of their liberty under the Mental Capacity Act

The guidance in this briefing is a summary only. You can find out more in the [Mental Capacity Act Code of Practice](#).

If you work in East Sussex County Council Adult Social Care the [practice guidance](#) on the Staff Intranet provides access to detailed guidance on best interests decision making including a supported decision making tool, templates and case studies. Ask your manager or safeguarding lead about other guidance available to your team.

The [East Sussex Learning Portal](#) offers training on the Mental Capacity Act including best interests decision making. This training is open to council employees and those from partner agencies and other local organisations.

See the links below for further information.

[Sussex Safeguarding Adults Policy and Procedures](#)  
[Mental Capacity Act Code of Practice](#)  
[SCIE MCA guidance](#)  
[Care Quality Commission guidance](#)  
[POhWER](#) (For information about the IMCA service and other advocacy services)

For further information in relation to this briefing or if you would like a copy of the full audit report, contact George Coleby, Quality Assurance & Learning Development Officer at [george.coleby@eastsussex.gov.uk](mailto:george.coleby@eastsussex.gov.uk) or 07712 236676