



# **Managers' Guidance for Best Interest Meetings**

## **Context – why Best Interests Decisions Making is Required**

This guidance forms an appendix to the care service Mental Capacity Act Policy. The Mental Capacity Act and Code of Practice should also be referred to as necessary.

A failure to engage correctly and effectively with people who do not have the mental capacity to make specific decisions for themselves, may have serious implications for care agencies, particularly for health trusts and local social services authorities. We are required to work within the statutory principles set out in section (s.) 1 of the MCA, and more particularly to apply s.4 of the Act to our actions for people who cannot make decisions for themselves.

A best interests meeting may be needed where an adult (16+ years) lacks mental capacity to make significant decisions for themselves and needs others to make those decisions on their behalf. It is particularly important where there are a number of agencies working with the person, or where there are unresolved issues regarding either the person's capacity or what is in their best interests and a consensus has not been reached. Issues around a person's capacity should, however, ordinarily be resolved before a best interests meeting is convened.

A best interests decision cannot be made for a service user if they have been assessed as having capacity to make the decision or, where there is doubt about capacity, a capacity assessment has not been undertaken to confirm that they lack capacity.

It is important to note that s.27-29 and s.62 of the Act set out the specific decisions which can never be made or actions which can never be carried out in a service user's best interests under the Act, whether by family members, carers, professionals, attorneys or the Court of Protection. This is because they are either so personal to the individual concerned or governed by other legislation. It does not preclude the Court of Protection, however, from making a declaration under s.15 of the Act with regard to the person's capacity to consent to the matters set out in point 1.5.1. The decisions this relates to are summarised below.

Decisions concerning family relationships (s.27). Nothing in the Act permits a decision to be made on someone else's behalf on any of the following matters:

- consenting to marriage or a civil partnership
- consenting to have sexual relations
- consenting to a decree of divorce on the basis of two years' separation
- consenting to the dissolution of a civil partnership
- consenting to a child being placed for adoption or the making of an adoption order
- discharging parental responsibility for a child in matters not relating to the child's property giving consent under the Human Fertilisation and Embryology Act 1990.

### **Mental Health Act Matters (s.28)**

Where a person who lacks capacity to consent is currently detained and being treated under Part 4 of the Mental Health Act 1983, nothing in the Act authorises anyone to:

- give the person medical treatment for mental disorder
- consent to the person being given medical treatment for mental disorder.

### **Voting Rights (s.29)**

Nothing in the Act permits a decision on voting, at an election for any public office or at a referendum, to be made on behalf of a person who lacks capacity to vote.

### **Unlawful Killing or Assisting Suicide (s.62)**

For the avoidance of doubt, nothing in the Act is to be taken to affect the law relating to murder, manslaughter or assisting suicide.

Although the Act does not allow anyone to make a decision about these matters on behalf of someone who lacks capacity to make such a decision for themselves (for example, consenting to have sexual relations), this does not prevent action being taken to protect a vulnerable person from abuse or exploitation.

### **The statutory principles laid out in s.1 of the Mental Capacity Act must be applied:**

- A person must be assumed to have capacity unless it is proved otherwise.
- Until all practical steps have been taken to help someone make a decision without success they cannot be treated as lacking capacity.
- An unwise decision does not in itself indicate a lack of capacity.
- Any act or decision made must be in the person's best interests.
- Any act or decision should aim to be the least restrictive option to the person in terms of their rights and freedom of action.

We recognise that establishing a positive relationship with the service user is crucial in gaining their trust. A person with mental capacity can disagree with the views of the professionals involved in their care. Service users may take a contrary view to professional opinion and this should be respected if they have mental capacity to make the decision. Service users have the right to make lifestyle choices and to refuse services provided they are doing so from an informed and capacitated position. Where there are concerns that the service user may be acting under duress and risks are significant, it is important to remember that there continues to be a duty of care. It may be appropriate to consider if the High Court's Inherent Jurisdiction is applicable and legal guidance should be sought.

A failure to make decisions that are in the best interests of the person may have serious implications and could lead to legal challenge. Protection from liability is afforded under the MCA where it can be evidenced that due process has been followed.

## What is a Best Interests Meeting?

A formal best interests meeting is likely to be required where the decisions facing the service user are complex and cannot be easily made by the decision-maker and immediate colleagues. There may be a range of options and issues that require the considered input of a number of different staff as well as those with a personal and/or legal interest in the needs of the person lacking mental capacity. A best interest meeting will be needed if there are different opinions about what is in the service user's best interests and a consensus cannot be reached. Differing opinions may exist between professionals or other interested parties such as relatives. Making sense of these issues and options can only be properly covered and addressed through holding such a meeting.

A best interests meeting should mean that the decision-making process is transparent, clearly recorded, and can stand up to subsequent scrutiny. In addition, a best interests meeting should ensure that service users are empowered and protected from random or unsound decision-making. However, it should be understood that a best interests meeting has no legal authority, other than demonstrating agreement of those within the meeting. Whilst chapter 15 of the Code of Practice gives guidance on dispute resolution, disagreements will need to be taken to the Court of Protection for a legal resolution if a consensus cannot be reached. In these circumstances legal advice should always be sought.

### Making a Decision in a Person's Best Interests Requires that:

- The service user has been assessed as lacking capacity to make the decision under scrutiny
- The decision under scrutiny is not one that is excluded by the legislation
- The Act's statutory principles and best interest's checklist are properly considered
- The service user, even though lacking mental capacity, remains central to the decision or decisions needing to be made and should be involved in the decision-making process whenever possible
- Relevant professional and informal networks are properly consulted
- There is a clear structure to the meeting, promoting partnership working, the sharing of relevant information and the positive expression of different views
- A clear analysis of the risks and benefits attached to different options being considered is undertaken and recorded
- All relevant circumstances are taken into consideration, including the person's beliefs and values, past and present wishes, and any written statements the person made when he/she had capacity. This may include an Advance Decision to refuse treatment or an Advance Statement of preferences/wishes
- Consideration is given to whether the decision can be delayed until the person regains capacity to make the decision for him/herself, if this is a possibility
- Consideration is given to other factors which might have influenced the person's decision such as altruistic intentions, consideration for others and duties and obligations towards future beneficiaries and/or dependents
- Consultation is carried out with others such as partners, carers, family members, and other relevant people where it is practicable and appropriate to do so
- The decision is not motivated by a desire to bring about the person's death when the decision relates to life-sustaining treatment
- Clear and accurate minutes are recorded of the meeting.

Where a decision cannot be made, for whatever reason, the best interests meeting will also have to decide what further actions may be required to expedite future decision-making, by whom and in what timescale. This may ultimately include referral to the Court of Protection.

## **Urgent Situations**

If the situation is very urgent, however, a meeting may not be possible and decisions will have to be made based on the information available, including the availability of people for consultation. The 'doctrine of necessity' may be invoked in an emergency situation. Actions in the person's best interests can be made providing the professional 'reasonably believes' a person lacks capacity and that the proposed treatment/action is necessary to save their life or to prevent a significant deterioration in their condition without formal documentation of the capacity assessment and best interests decision.

Clearly in an emergency, urgent decisions will have to be made and immediate action taken in the person's best interests. In these situations, it may not be practical or appropriate to delay the decision to in order to consult with any known attorneys or deputies who cannot be immediately contacted. It is important to record any attempts to contact known attorneys or deputies that have been unsuccessful.

The MCA does not give any clear indication as to how long it would be acceptable for decisions to be made under the doctrine of necessity. It is sensible to assume that as soon as someone's capacity can be formally assessed and their best interests decided, this is what should happen.

## **When is a Best Interests Meeting Required?**

There will be no need to hold a formal best interest meeting in most cases because there is agreement about what is in a person's best interests and the way forward. Consideration should always be given to whether a formal best interest meeting should be held where there is a lack of consensus between interested parties. This could be where there is a difference of opinion between professionals, or between professionals and family members or friends. It may be appropriate to call a formal meeting where there are significant risks associated with the decision. Formal meetings can support the decision making process and assist interested parties to reach an agreement. It is also a way to ensure that the decision making process is clearly evidenced and defensible.

A best interests meeting may be needed following a formal recorded assessment of mental capacity in relation to the following sorts of decisions:

- Where to live, if a significant change is envisaged
- What care services and support to receive at home
- What care services and/or support should the person receive away from the home (ie in a particular placement)
- Who the person should have contact with
- Whether to report a criminal or abusive act
- Having serious medical treatment – whilst noting that permission for some serious medical treatments, such as sterilisation, can only be granted by the Court of Protection.

These examples are not exhaustive and each situation needs to be judged on its merits, using professional judgment. Clarity is provided in the Mental Capacity Act Code of Practice. In some cases the decision under consideration may be within the scope of the authority of an Attorney or Court Appointed Deputy, making them the decision- maker. The local authority may consider that it is appropriate to arrange a formal best interest meeting either to support the decision maker to reach a decision, or where there is a lack of consensus with the decision maker or third parties, with the aim of facilitating an amicable resolution.

Where efforts to reach a consensus have not been successful and differences of opinion persist about what is in the person's best interests there is recourse in law to the Court of Protection. It is important to remember that the minutes of the best interest meeting may be required by, and submitted to the Court of Protection. The Court will expect to see evidence that documents the options under consideration using the 'balance sheet' approach and that demonstrates that all parties' views have been considered and efforts have been made to reach an informal agreement. This will help the Judge to understand the situation and come to a decision. It is, therefore, vitally important to ensure that minutes accurately record proceedings and are fit for purpose and scrutiny.

### **The Best Interests Meeting – Who Chairs?**

It is generally best practice that the person who Chairs or co-ordinates the best interests' meeting is not the person who is the decision-maker. This avoids any possible conflict of interest. The decision-maker must attend the meeting. It would usually be expected that a Principal Practitioner or a registered and experienced health or social care professional will Chair the best interests meeting, or in exceptional circumstances a General Manager. The Chair needs to be someone with the skills to manage a meeting at which competing views and opinions may be expressed.

The Chair of the meeting must ensure that best interests of the person to whom the decision relates are central to discussions and may be required to provide some mediation and negotiation so that this is achieved. Thought should be given to whether the person is able to attend, and, if not, how their views will be represented. At the end of the meeting the Chair will also need to be able to summarise the discussion and confirm the way forward and actions to be taken.

To support service users, their family members and/or their representatives in feeling as comfortable as possible on the day of the meeting, it is good practice for the Chair to arrange to meet (with those identified above) at the venue approximately 20 minutes before the meeting is due to commence. This allows attendees to have an opportunity to meet face to face and express any concerns or fears they may have about the process. It also allows time for the Chair to orientate the attendees to the environment (e.g. where the toilets are situated etc.), explain the best interests decision making process, outline the meeting agenda, identify who will be attending and allow people to settle in the room before the other attendees arrive.

The Chair may also consider the value of staggering or holding the meeting in sections, with some people invited to attend at a specific time. This is a useful strategy to implement in situations where family members do not get on with one another but wish to attend. If the service user is attending the meeting, the Chair should also consider whether it would be too distressing for the service user if certain people attend. If this is the case, arrangements should be made for their views and opinions to be identified and recorded prior to the meeting and for these to be tabled as part of the process.

A person's needs and situation may fall within different legislative structures or other processes, such as under the Mental Health Act 1983 or adult safeguarding arrangements. It may be necessary and appropriate to include reference to these elements within the best interests meeting. This is a matter on which the Chair for the meeting needs to give some consideration. An MCA best interests meeting is not a substitute for an adult safeguarding strategy meeting, or any meeting under the Care Programme Approach or other care planning framework. The person chairing the best interests meeting should confirm at the start of the meeting the relationship of the meeting to any of these other elements, and whether they may also need to be addressed separately within a different formal or statutory process.

## The Best Interests Meeting – Who Should be the Decision-Maker

Under the Act, many different people may be required to make decisions or act on behalf of someone who lacks capacity to make decisions for themselves. The person making the decision is referred to in chapter 5 and in other parts of the Code, as the 'decision-maker', and it is the decision-maker's responsibility to work out what would be in the best interests of the person who lacks capacity.

For most day-to-day actions or decisions, the decision-maker will be the carer most directly involved with the person at the time. Where the decision involves the provision of medical treatment, the doctor or other member of healthcare staff responsible for carrying out the particular treatment or procedure is the decision-maker. Where nursing or paid care is provided, the nurse or paid carer will be the decision-maker.

For decisions that involve social care it will be an adult social care staff member who is the decision-maker. However, if there is a lack of consensus between interested parties with the local authority's view, it is advisable to ensure that the decision-maker is independent and holds neutral views. This will ensure transparency and equity in the decision-making process and it will ensure that there is no real or perceived conflict of interests. The decision-maker must be satisfied that the assessment of the person's capacity that relates to the decision is sufficiently robust to demonstrate that they lack capacity to make the decision under scrutiny, and which the intention is that they make on the person's behalf.

The decision-maker must be clearly identified and is responsible for deciding what is in the best interests of the person who lacks capacity. It is desirable to aim for consensus, but, ultimately, there is only one decision-maker. If a Lasting Power of Attorney (or Enduring Power of Attorney) has been made and registered, or a deputy has been appointed under a court order, the attorney or deputy will be the decision-maker, for **decisions within the scope of their authority**. There may be situations where the local authority considers that it is appropriate to help to arrange a meeting to support the decision-maker, or where there is lack of consensus with the decision-maker or third parties to attempt to reach an amicable resolution.

No matter who is making the decision, the most important thing is that the decision-maker tries to work out what would be in the best interests of the person who lacks capacity.

## The Best Interests Meeting – Who Should Attend?

The Act places a duty on the decision-maker to consult others who are close to a service user who lacks capacity, where practical and appropriate, on decisions affecting the service user and what might be in their best interests. Careful consideration should be given so as not to exclude people who may have an interest. It is likely that it will be the key worker/main assessor worker who is responsible for this process and for ensuring that interested parties are invited to attend or that their views are made available to the decision-maker. Under s.4(7), the decision-maker has a duty to take into account the views of the following people where it is practical and appropriate to do so:

The person assessed as lacking mental capacity:

- Family members, parents, carers and other people interested in the welfare of the person, if this is practical and appropriate
- Any person who holds an Enduring Power of Attorney or a Lasting Power of Attorney made by the person now lacking capacity

- Any advocate who is involved, including the statutory Independent Mental Capacity Advocate (IMCA) Service (refer to chapter 10 of the MCA Code of Practice for further information about the role of the IMCA)
- Any deputy appointed by the Court of Protection who can make decisions on behalf of the person lacking mental capacity
- Any professional person who can contribute to the outcome of the best interests meeting.

It will be the responsibility of the Chair and the decision-maker to ensure that the consultation process has been undertaken thoroughly and that the best interest meeting can proceed. In the event that there is concern that the meeting will not represent the views of all those who should be consulted, it may be necessary to adjourn the meeting until this has been achieved.

Anyone who attends a best interests meeting must be clear about their role and the contribution they can make in the meeting. They should also come prepared with relevant information and be prepared to contribute this to the discussion. Agreement should be reached about how to include the contribution of any person who is unable to attend, so that the meeting can still serve its purpose rather than be unduly delayed.

### **The Best Interests Meeting – Preparing for the Meeting and Supporting Attendees:**

For some people, being invited to attend a best interests meeting can lead to feelings of increased anxiety and uncertainty about what may be expected of them.

It is important that the person who is convening the meeting communicates clearly with those who have been invited at the earliest possible opportunity. This is particularly relevant when the person deemed to lack capacity is attending and for any family members, people appointed as power of attorney, deputy and carers etc.

The person who convened the meeting should also ensure that the following information is sent out to attendees prior to the meeting taking place:

- The contact details of a person who will be able to answer any questions relating to the meeting
- Information on how to access the MCA Code of Practice
- A list of people who have been invited and their roles
- Special consideration should be given to the venue chosen for the meeting for,
- e.g. wheelchair access/lifts/accessible parking, easy access to toilets, provision of refreshments etc.
- It may be appropriate for the meeting to take place at the relevant person's home or day care setting to maximise their ability to attend for some or all of the meeting, if it has been assessed as appropriate for the person to attend and the person wants to.

### **The Best Interests Meeting – How is it Recorded?**

It will be the responsibility of the Chair to ensure that the meeting is going to be accurately recorded. The minute taker should ensure that the minutes are an accurate record of the meeting and be aware that the minutes may need to be submitted to the Court of Protection. It is the responsibility of the Chair to ensure that the minutes recorded by the minute taker are factually correct and clearly represent the meeting.



The outcome of the best interests meeting and associated viewpoints should be recorded on the Best Interests Meeting Minutes template. This provides a framework which incorporates the balance sheet approach for recording options. The best interests meeting needs to be structured and recorded in such a way that it is clear who attended (and those who were unable to attend), what discussions took place, and what outcomes were agreed. Whilst the minutes should record the issues and the discussion that took place, the emphasis needs to be on an analysis of the risks and benefits attached to the different options. They will need to identify those responsible for undertaking the agreed actions as well as the timescales within which those actions will be taken.

In line with the approach taken in the Court of Protection and widely accepted best practice, a 'balance sheet' approach should be adopted to reach a best interests decision. Medical, emotional, social and welfare interests may be relevant and should be entered onto the 'balance sheet'. At the end of the process it should be possible to 'strike a balance' between the sum of the certain and possible gains against the sum of the certain and possible losses. This approach includes:

- Identifying all the options
- Entering all the actions and potential benefits, risks, advantages and disadvantages of each option, including the likelihood or certainty they will happen
- Underlining factors that are particularly important
- Highlighting any one factor that has over-riding importance
- Assessing which option is in the person's best interests.
- The minutes should clearly identify the name of the person who has prepared the record together with the name of the organisation on whose behalf the minutes have been prepared
- The minutes should clearly identify who attended the meeting and what their relationship, whether personal or professional, is to the service user.
- In order to ensure that appropriate communication is forwarded to the person concerned, the minutes of the meeting must be presented in a way that is accessible to all. It should be apparent from the minutes how the decision about the person's best interests was reached, what the reasons for reaching the decision were, who was consulted to help work out those best interests and what particular factors were taken into account.

## Dispute Resolution

All efforts should be made to resolve differences of opinion about what is in a service user's best interests through the best interest meeting process. In some instances this will not be possible. It may be that the best interests decision-making process has either become 'stuck' or has revealed an area of uncertainty, or there is dispute or difference of opinion between key agencies or a third party such as a family member, attorney or deputy. In these circumstances, consideration should be given to whether an application should be made to the Court of Protection and legal advice sought.

In some situations, where it becomes clear that a consensus cannot be reached, the Court of Protection has made it clear that it expects local authorities to take the necessary action to bring the case before the Court in a timely manner. It is imperative that legal advice is sought without delay to ensure that the service user is not further disadvantaged, the views of third parties are represented and that the reputation of the local authority is not potentially compromised. These situations may arise when:

- No consensus could be reached about what is in the person's best interests
- The decision-maker cannot decide

- Parties cannot or refuse to abide by the decision reached by the meeting
- Legal action being sought by a third party
- The decision is contentious
- The person is at risk of significant harm if the best interests decision is not followed.

If the dispute needs to be resolved urgently, for example, because a service user lacking mental capacity is at risk of harm, consider whether an urgent referral to the Court of Protection is needed. If this is the case, it is imperative that staff seek legal advice. The Court of Protection is available out of hours in appropriate circumstances for emergencies.

Any person holding a relevant lasting power of attorney authority, or a court appointed deputy is not bound to follow this guidance, but they are bound by the MCA's Code of Practice. They are required to consult others as part of the best interest process and ideally should attend so that they can hear the views of all interested parties. They may feel they want to bypass attending a best interest meeting, or they may not be happy with the outcome of a best interest's decision meeting. In such cases, the holder of a relevant lasting power of attorney may simply decide to proceed with their decision and/or take legal advice. If they decide to proceed with their decision and where there are concerns about the consequences of that decision or the service user, the practitioner should take immediate advice from the Company Chief Executive. It may be that the matter will need to be referred to the Court. In some instances, an urgent application to the Court may be required.

Where the attorney or deputy is not acting in the service user's best interests and they are not discharging the duty of care, they are required by the legislation to demonstrate that they have adhered to the MCA Code. The Office of the Public Guardian has a safeguarding function and will scrutinise the actions of an attorney or deputy, and the Court of Protection has discretion to remove their authority. It is the responsibility of adult social care to bring any concerns immediately to the attention of the Office of the Public Guardian who can be contacted on 0300 456 0300. Where the issue is around an immediate decision the process referred to in point 10.4 should be considered.

## **Confidentiality**

Attendance, and the subsequent sharing of information relating to the person lacking mental capacity, must always happen in line with the Data Protection Act 1998 requirements and should be provided on a need-to-know basis. It may be appropriate for some contributors to only attend part of the meeting, or provide information through earlier discussion or in writing.

## **Further Information**

The British Psychological Society (BPS) 'Best Interests Guidance on determining the best interests of adults who lack the capacity to make a decision (or decisions) for themselves (England and Wales) (2007) is available on their website [www.bps.org.uk](http://www.bps.org.uk).

For more information on the MCA, visit the Social Care Institute for Excellence (SCIE) website at [www.scie.org.uk](http://www.scie.org.uk). SCIE receives Department of Health funding to promote good practice and produce information, guidance and training materials that are available to professionals and the general public.

The online tool BRIDGET allows you to check whether a best interests process has been followed. Completing it generates a printable report that indicates how closely the process used matches the guidance set out in the MCA Code of Practice [www.bestinterests.org.uk](http://www.bestinterests.org.uk).