

Decision-making and mental capacity overview

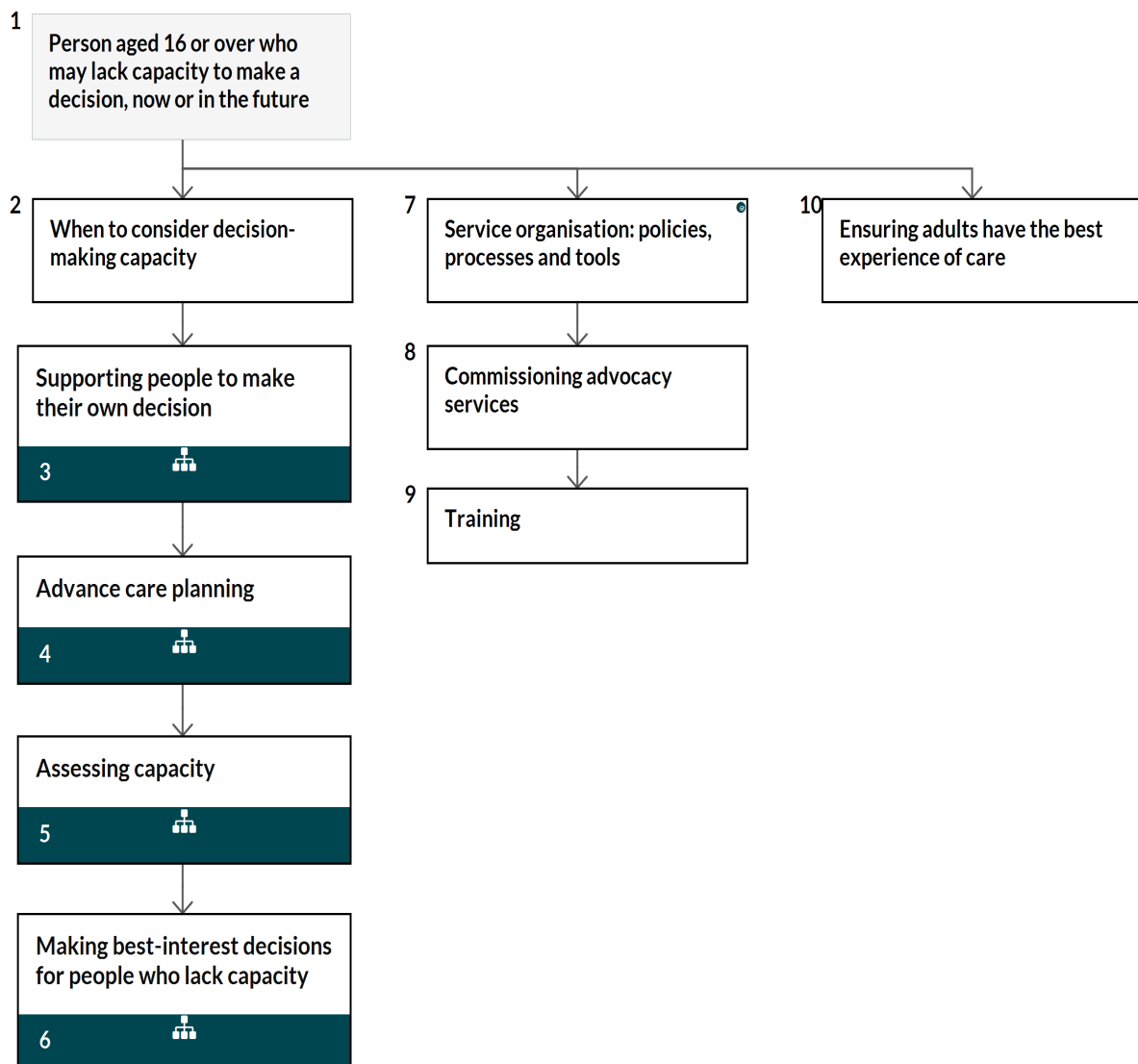
NICE Pathways bring together everything NICE says on a topic in an interactive flowchart. NICE Pathways are interactive and designed to be used online.

They are updated regularly as new NICE guidance is published. To view the latest version of this NICE Pathway see:

<http://pathways.nice.org.uk/pathways/decision-making-and-mental-capacity>

NICE Pathway last updated: 11 August 2020

This document contains a single flowchart and uses numbering to link the boxes to the associated recommendations.



1 Person aged 16 or over who may lack capacity to make a decision, now or in the future

No additional information

2 When to consider decision-making capacity

Practitioners involved in making decisions regarding individuals who lack capacity or supporting decision-making in individuals who have capacity must follow the 5 key principles set out in [section 1](#) of the [Mental Capacity Act 2005](#) [See page 8]. As a starting point they must assume capacity unless there is evidence to suggest an assessment is required.

3 Supporting people to make their own decision

[See Decision-making and mental capacity / Supporting people to make their own decision](#)

4 Advance care planning

[See Decision-making and mental capacity / Advance care planning for people who may lack capacity to make decisions in future](#)

5 Assessing capacity

[See Decision-making and mental capacity / Assessing a person's capacity to make a decision](#)

6 Making best-interest decisions for people who lack capacity

[See Decision-making and mental capacity / Making a best-interest decision on behalf of someone who lacks capacity to make that decision](#)

7 Service organisation: policies, processes and tools

Co-develop policies and [Mental Capacity Act 2005](#) [See page 8] training programmes with people who have experience of supported decision-making and of having their mental capacity

assessed, and their carers, family and friends.

All health and social care organisations should:

- develop local policy and guidance about which interventions, tools and approaches will be used to support decision-making
- identify or devise specific tools to help health and social care practitioners assess where appropriate and necessary the mental capacity of the people they are working with and audit the tools against adherence to the Mental Capacity Act [Code of Practice](#)
- train relevant practitioners in the use of these tools.

Supporting people to make their own decision

Organisations should ensure they can demonstrate compliance with principle 2, [section 1\(3\)](#) of the Mental Capacity Act 2005 by monitoring and auditing:

- person-reported outcomes, including the extent to which the person experiences collaboration and empowerment when making important decisions and the extent to which they experience support for their decision-making
- practitioner-reported outcomes, including the frequency and quality of steps they have taken to support decision-making
- process outcomes, including the frequency and quality of formal recording of steps taken to support decision-making and the use of overt and covert coercion during decision-making.

Advance care planning

Healthcare commissioners and providers should:

- develop standard protocols and plans for joint working and sharing of information on advance care plans between practitioners, people and families
- ensure that protocols and plans reflect the optional nature of advance care planning
- commission training on advance care planning, including [advance decisions to refuse treatment](#) [See page 8] and a [Lasting Power of Attorney](#) [See page 8]
- demonstrate that protocols are in place and training is available by including advance care planning in audits.

Resolving disputes about capacity assessments

Organisations should have clear policies or guidance on how to resolve disputes about the outcome of the capacity assessment, including how to inform the person and others affected by the outcome of the assessment.

Monitoring of capacity assessments

Health and social care organisations should monitor and audit the quality of mental capacity assessments, taking into account the degree to which they are collaborative, person centred, thorough and aligned with the Mental Capacity Act 2005 and Code of Practice.

Include people's views and experiences in data collected for monitoring an organisation's mental capacity assessment activity.

Making best interest decisions

Health and social care services must ensure that best interests decisions are being made in line with the Mental Capacity Act 2005.

Health and social care services should:

- implement a service-wide process for recording best interests decisions and ensure that staff are aware of this **and**
- have clear systems in place to support practitioners to identify and locate any relevant written statement made by the person when they had capacity, at the earliest possible time.

Health and social care organisations should provide toolkits to support staff to carry out and record best interests decisions. These toolkits should include:

- how to identify any decision-making instruments that would have an impact on best interests decision-making occurring (for example a Lasting Power of Attorney, advance decisions to refuse treatment, court orders)
- when to instruct an Independent Mental Capacity Advocate
- a prompt to consult interested parties (for example families, friends, advocates and relevant professionals) and a record of who they are
- guidance about recording the best interests process and decision. This may include, for example, a balance sheet, which may assist in documenting the risks and benefits of a particular decision
- instructions on what information to record, ensuring this covers:
 - a clear explanation of the decision to be made
 - the steps that have been taken to help the person make the decision themselves
 - a current assessment concluding that the person lacks the capacity to make this decision, evidencing each element of the assessment
 - a clear record of the person's wishes, feelings, cultural preferences, values and beliefs, including any advance statements
 - the concrete choices that have been put to the person

- - the salient details the person needs to understand
 - the best interests decision made, with reasons.

Quality standards

The following quality statement is relevant to this part of the interactive flowchart.

4. Best interests decision making

8 Commissioning advocacy services

Public bodies' duties and monitoring compliance

Commissioners, public bodies and providers of statutory advocacy services should work closely to ensure that:

- statutory duties on public bodies to refer to and involve advocacy are consistently adhered to and monitored **and**
- failures in the duty to refer to statutory advocacy are addressed.

Training and competencies relating to advocacy

Relevant commissioners and providers should work with public bodies and providers to increase investment in training for statutory independent mental capacity and other statutory advocates in key areas, in order to ensure they are able to support:

- people who have communication difficulties **and**
- Independent Mental Capacity Advocates to have expertise in specific areas that require additional skills and knowledge – for example working with people with impaired executive function arising from acquired brain injury, mental illness, dementia or other illness.

9 Training

Service providers and commissioners should ensure that practitioners undergo training to help them to apply the [Mental Capacity Act 2005 \[See page 8\]](#) and its [Code of Practice](#). Training should be tailored to the role and responsibilities of the practitioner and cover new staff, pre-registration, and continuing development and practice supervision for existing staff. Where appropriate, training should be interdisciplinary, involve experts by experience and include:

- the statutory principles of the Mental Capacity Act 2005

- the importance of seeking consent, and how to proceed if a person might lack capacity to give or refuse their consent to any proposed intervention
- how and when to have potentially difficult conversations about loss of autonomy, advance care planning or death
- required communication skills for building trust and working with people who may lack capacity
- clarity on roles and responsibilities
- the advantages, challenges and ethics of advance care planning, and how to discuss these with the person and their carers, family and friends
- the processes and law surrounding advance decisions to refuse treatment [See page 8] and lasting powers of attorney/court appointed deputies
- condition-specific knowledge related to advance care planning, where appropriate
- the conduct of decision- and time-specific capacity assessments
- the process of best interests decision-making in the context of section 4 of the Mental Capacity Act 2005 and associated guidance
- the role of Independent Mental Capacity Advocates in best interests decision-making
- how to direct people to sources of advice and information.

10 Experience of care

Use these recommendations with NICE's recommendations on:

- patient experience in adult NHS services
- people's experience in adult social care services
- service user experience in adult mental health services.

Advance decisions to refuse treatment

An advance decision to refuse treatment (sometimes known as an ADRT or a living will) is a decision an individual can make when they have capacity to refuse a specific type of treatment, to apply at some time in the future when they have lost capacity. It means that families and health professionals will know the person's decisions about refusing treatment if they are unable to make or communicate the decisions themselves.

An advance decision must be valid and applicable before it can be legally binding. For example, one of the conditions is that the individual is aged 18 or over at the time the decision is made. To establish whether an advance decision to refuse treatment is valid and applicable, practitioners must have regard to [sections 24-26 of the Mental Capacity Act 2005](#). If the advance decision purports to refuse life-sustaining treatment, additional requirements apply.

Lasting Power of Attorney

A legal instrument that allows a person (the 'donor') to appoint one or more people (known as 'attorneys') to make decisions on their behalf. There are 2 types: health and welfare, and property and financial affairs, and either one or both of these can be made. To have legal force, Lasting powers of attorney must be created in accordance with [section 9](#) and [section 10](#) of the Mental Capacity Act 2005. The attorney must have regard to [section 4 of the Mental Capacity Act 2005](#), the Mental Capacity Act [Code of Practice](#), and must make decisions in the best interests of the person.

Mental Capacity Act 2005

The [Mental Capacity Act 2005](#) is designed to protect and empower people who may lack capacity to make their own decisions about their care and treatment. It is a law that applies to people aged 16 and over in England and Wales and provides a framework for decision-making for people unable to make some or all decisions for themselves.

Glossary

Advance care planning

(advance care planning with people who may lack mental capacity now or in the future is a voluntary process of discussion about future care between the person and their care providers – if the person wishes, their family and friends may be included in the discussion; with the

person's agreement this discussion is documented, regularly reviewed, and communicated to key persons involved in their care)

Consent

(the voluntary and continuing permission of the person to receive particular treatment or care and support, based on an adequate knowledge of the purpose, nature, likely effects and risks including the likelihood of success, any alternatives to it and what will happen if the treatment does not go ahead; permission given under any unfair or undue pressure is not consent – by definition, a person who lacks capacity to consent does not consent to treatment or care and support, even if they co-operate with the treatment or actively seek it)

Sources

[Decision-making and mental capacity \(2018\) NICE guideline NG108](#)

Your responsibility

Guidelines

The recommendations in this guideline represent the view of NICE, arrived at after careful consideration of the evidence available. When exercising their judgement, professionals and practitioners are expected to take this guideline fully into account, alongside the individual needs, preferences and values of their patients or the people using their service. It is not mandatory to apply the recommendations, and the guideline does not override the responsibility to make decisions appropriate to the circumstances of the individual, in consultation with them and their families and carers or guardian.

Local commissioners and providers of healthcare have a responsibility to enable the guideline to be applied when individual professionals and people using services wish to use it. They should do so in the context of local and national priorities for funding and developing services, and in light of their duties to have due regard to the need to eliminate unlawful discrimination, to advance equality of opportunity and to reduce health inequalities. Nothing in this guideline should be interpreted in a way that would be inconsistent with complying with those duties.

Commissioners and providers have a responsibility to promote an environmentally sustainable

health and care system and should assess and reduce the environmental impact of implementing NICE recommendations wherever possible.

Technology appraisals

The recommendations in this interactive flowchart represent the view of NICE, arrived at after careful consideration of the evidence available. When exercising their judgement, health professionals are expected to take these recommendations fully into account, alongside the individual needs, preferences and values of their patients. The application of the recommendations in this interactive flowchart is at the discretion of health professionals and their individual patients and do not override the responsibility of healthcare professionals to make decisions appropriate to the circumstances of the individual patient, in consultation with the patient and/or their carer or guardian.

Commissioners and/or providers have a responsibility to provide the funding required to enable the recommendations to be applied when individual health professionals and their patients wish to use it, in accordance with the NHS Constitution. They should do so in light of their duties to have due regard to the need to eliminate unlawful discrimination, to advance equality of opportunity and to reduce health inequalities.

Commissioners and providers have a responsibility to promote an environmentally sustainable health and care system and should assess and reduce the environmental impact of implementing NICE recommendations wherever possible.

Medical technologies guidance, diagnostics guidance and interventional procedures guidance

The recommendations in this interactive flowchart represent the view of NICE, arrived at after careful consideration of the evidence available. When exercising their judgement, healthcare professionals are expected to take these recommendations fully into account. However, the interactive flowchart does not override the individual responsibility of healthcare professionals to make decisions appropriate to the circumstances of the individual patient, in consultation with the patient and/or guardian or carer.

Commissioners and/or providers have a responsibility to implement the recommendations, in their local context, in light of their duties to have due regard to the need to eliminate unlawful

discrimination, advance equality of opportunity, and foster good relations. Nothing in this interactive flowchart should be interpreted in a way that would be inconsistent with compliance with those duties.

Commissioners and providers have a responsibility to promote an environmentally sustainable health and care system and should assess and reduce the environmental impact of implementing NICE recommendations wherever possible.