

# Nursing Homes Support Scheme 'A Fair Deal'

## Quick Guide on the Functional Assessment of Capacity

### Key facts to be aware of before completing the Mental Capacity Report<sup>1</sup>

(This document is intended for Medical Practitioner Guidance only. It does not purport to be a legal interpretation of the Nursing Homes Support Scheme Act 2009.)

#### The Nursing Home Support Scheme

This is a scheme of financial support for people in need of long-term nursing home care. The Scheme involves three steps, a care needs assessment; a financial assessment and an optional step of an application for a nursing home loan (known legally as Ancillary State Support).

##### ➤ The Financial Assessment and Nursing Home Loan

Part of the financial assessment will include an assessment of a person's assets. If a person has assets, they may be asked to contribute up to 7.5% of their market value (or 3.75% if a member of a couple) per annum towards the cost of their care (Note: the contribution based on assets is 5% (2.5% for a member of a couple) the application was made prior to the 25<sup>th</sup> July 2013). If the person so wishes, the HSE will advance a loan to cover this portion of their contribution and register a charge against the property. The loan will be recouped upon the person's death (or may be further deferred in certain circumstances).

##### ➤ The Mental Capacity Report

In order for the HSE to advance the loan, they must be satisfied that the person has capacity to agree to the loan and charge against their property. If not, a care representative may be appointed by the Court to do so for them. This requires two mental capacity reports from registered medical practitioners.

### Key facts to be aware of when undertaking this assessment

1. This test is **not required for all applications under the Nursing Homes Support Scheme** and is only required if a person is suspected to lack capacity to apply for the loan under the Scheme and register a charge against their property.
2. The Nursing Home Support Scheme Act, 2009 enshrines a legal **presumption that everyone has full capacity**.
3. This is a very **limited, functional capacity** assessment. It is not a global assessment of capacity. The only question being examined is the person's functional capacity to apply for the loan and agree to a charge against their property. It is only based on the person's capacity to understand these matters at the time of the assessment.
4. The assessment is only relevant to the application for a loan against **property/land in the State** and a Care Representative appointed on foot of it will only have legal authority to apply for the loan, agree to a charging order against the property and take necessary actions in relation to this. They will have no further legal powers.
5. Under the Nursing Homes Support Scheme Act 2009 all of the services which the HSE has determined are to be provided, are **conclusively presumed to be for the**

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<sup>1</sup> For a more complete explanation of the Act and the Functional Assessment of Capacity, please read the "Guidance Document of the Functional Assessment of Capacity" available from [www.doh.ie](http://www.doh.ie).

**benefit of and necessary for the health and welfare of the person**, and the person is required to contribute towards the cost of these services regardless of their capacity.

6. The Mental Capacity Report will be one of two Capacity reports from two registered medical practitioners who have examined the person concerned. They will be submitted as evidence to the Circuit Court with the application from the Care Representative. The **Circuit Court will make the decision** regarding appointment of a Care Representative.
7. A **Solicitor is not required** (though the applicant can employ one if they choose to do so).

### **What is Capacity for the purposes of the Nursing Homes Support Scheme?**

The Act defines capacity with regard to **four matters**, all of which must be assessed to determine if a person has capacity. Following are the four matters, and all must be met in order for a decision of capacity to be made (i.e. **a person is deemed to lack capacity if they fail on any of the four grounds**). The basis for the decision must be set out. Under each heading we have listed some questions/items which may assist the practitioner in determining the matter but these are not to be considered prescriptive or infringe in any way on the practitioners right to make a determination on clinical grounds.

It is important not to assess a person's capacity before they have been given relevant information about the decision. Full explanatory documentation about the general Scheme and Capacity is available from [www.hse.ie](http://www.hse.ie); or [www.dohc.ie](http://www.dohc.ie);

1. Is the person able to understand the information relevant to the decision?
  - Do they know this is a loan and will have to be repaid?
  - Do they understand that a charge will be placed against their house/land?
  - Do they know why they are being asked to make this decision?
  - Are they aware of the likely effect of deciding one way or another, or not at all?
2. Is the person able to retain the information?
  - Questions from 1, or other questions could be repeated at the end of the interview to establish retention. (Note:- a person needs to retain information long enough to make an effective decision. Written or visual information may help with this).
3. Is the person able to use or weigh the information as part of the process of making the decision?
  - Do they understand that this is a charge that will have to be repaid when they, or their spouse, die?
  - Do they understand that if they do not avail of the loan, they will have to pay this contribution upfront to the nursing home/HSE?
4. Is the person able to communicate the decision by any means (including by means of a third party)? (Note:- if a person is not able to communicate a decision in any way at all, this is deemed to mean they do not have the capacity to make the decision).
  - All assistance should be given to a person to communicate including muscle movement, speech/language etc.