Nursing Homes Support Scheme
‘A Fair Deal’

Guidance Document on the Functional Assessment of Capacity

Please note that this document is intended as guidance for medical practitioners undertaking the functional assessment of capacity and for people undergoing the assessment. It does not purport to be a legal interpretation of the Nursing Homes Support Scheme Act 2009.

1. What is the Nursing Homes Support Scheme?
The Nursing Homes Support Scheme is a system of financial support for people in need of long-term nursing home care. The legislative basis for the scheme is the Nursing Homes Support Scheme Act 2009. Applicants to the scheme must undergo a care needs assessment to determine whether they need nursing home care and a financial assessment to determine their ability to contribute towards their own care. Based on the outcome of both these assessments, the HSE will decide on the payment of financial support.

The scheme involves a co-payment arrangement between the person and the State. Essentially, the person will contribute up to 80% of assessable income and 7.5% of the value of any assets they own (5% of assets if the application was made prior to the 25th July 2013) towards the cost of their care. The State will then pay the full balance of the cost. It is important to note that a person will never pay more than the cost of their care regardless of the level of their means.

2. What is the Nursing Home Loan?
The contribution based on land and property in the State may be deferred for the person’s lifetime and collected from their estate. This is an optional feature of the scheme which is termed the “Nursing Home Loan” (although the legal term is “Ancillary State support”). It may be thought of as a loan advanced by the HSE to a person to help them meet the cost of contributions from assets such as their home. Its purpose is to ensure that a person does not have to sell their home or other land and property-based assets during their lifetime if they do not wish to do so.

In simple terms, the HSE will advance a loan to a person and secure it by placing a Charging Order against the asset in question.

3. What is the role of the Care Representative?
In order to benefit from the Nursing Home Loan, a person needs to consent to a Charging Order being placed against the asset in question. The Charging Order is a simple type of mortgage which provides the security for the loan advanced by the HSE. If a person is found to lack capacity under the functional assessment (see section 4 and 5 below), they will not be able to consent to the creation of the Charging Order. For this reason, they will require a care representative to act on their behalf.

The care representative must be appointed by the Circuit Court. Their role is set out in section 21 of the legislation and is limited to:

- making an application for the Nursing Home Loan,
- consenting to the creation of a Charging Order in relation to the asset concerned, and
- taking necessary actions in connection with the application for the Nursing Home Loan, the creation of the Charging Order and the registration of the Charging Order in the Land Registry or the Registry of Deeds.

While the role of, and requirement for, the care representative is clearly limited to the actions listed at (a) to (c) above, a care representative may assist an applicant to the scheme with any matter in the same way that a non-court appointed representative may.

4. When is a care representative required?

A care representative is required where a person lacks the capacity to make a decision in relation to the matters listed at (a) to (c) above. They are not needed where a person has the capacity to make such decisions. They are also not needed if:

- the person is already a ward of court (in such cases the Committee of the person may apply where it has been authorised to do so by the President of the High Court), or
- the person has appointed an attorney under an enduring power of attorney who is not restricted from performing any of the actions listed in (a) to (c) above and the enduring power of attorney has been registered and is in force, or
- another person is permitted by law to act on behalf of the person in relation to a matter listed at (a) to (c) above.

5. What is capacity and how is it determined?

Section 21 of the legislation sets out the overall principle of presumption of capacity. In other words, it must always be presumed that a person has full mental capacity to make a decision until the contrary is established.

For the purposes of appointing a care representative, a person's capacity refers specifically to their capacity to make a particular decision at the time of the assessment. A person is considered not to have the capacity to make a decision if they are unable to do any one of the following-
(i) to understand the information relevant to the decision,
(ii) to retain that information,
(iii) to use or weigh that information as part of the process of making the decision, or
(iv) to communicate their decision by any means (including by means of a third party).

6. How is capacity assessed?
In assessing whether a person has capacity, the starting point must be to presume that the person has capacity until the contrary is established. The person undertaking the assessment ('the assessor') must then establish whether the person has the capacity to make a decision in relation to the matters set out at (a) to (c) overleaf at the point in time when the assessment is being undertaken. In other words, the assessment of capacity is based on a functional approach, and is time and issue specific.

It is accepted that some people have fluctuating capacity in relation to their understanding of certain matters. However, the assessment will be based only upon the person's capacity to understand those matters at the time of the assessment.

In order to assess whether a person has the capacity to make a particular decision, the assessor should try to establish the following:

- Does the person have a general understanding of what decision they need to make and why they need to make it?
- Does the person have a general understanding of the likely consequences of making, or not making, this decision?
- Is the person able to understand the information relevant to the decision?
- Is the person able to retain the information relevant to the decision, and use and weigh it as part of the process of making the decision?
- Is the person able to communicate their decision by any means?

**Understanding the decision and information relevant to the decision**
The matters for decision which are relevant to the care representative process are as follows:

(a) making an application for the Nursing Home Loan,
(b) consenting to the creation of a Charging Order in relation to the asset concerned, and
(c) taking necessary actions in connection with the application for the Nursing Home Loan, the creation of the Charging Order and the registration of the Charging Order in the Land Registry or the Registry of Deeds.

It is important not to assess someone's capacity before they have been given relevant information about that decision. Every effort must be made to provide information in a way that is most appropriate to help the person to
understand. When considering the form of communication which is likely to be most effective, regard should be had to the individual's needs and circumstances. For example, some people may find diagrams or visual representations accessible while others may find simple examples helpful. Others may require sign language or the assistance of a third party such as a family member.

Relevant information includes:

- The nature of the decision.
- The reason why the decision is needed.
- The likely effects of deciding one way or another, or making no decision at all.

Relevant information for the purposes of the care representative process is provided in section 9 of this guidance document.

Retaining information relevant to the decision
The person must be able to hold the information in their mind long enough to use it to make an effective decision. Having written or visual information to hand may be helpful for the person in this regard.

Using or weighing information as part of the decision-making process
For someone to have capacity, they must have the ability to weigh up information and use it to arrive at a decision. For example, a person may understand what a mortgage is but may be unable to use that knowledge to make a decision as to whether they wish to consent to the creation of a mortgage and the consequences of providing such consent.

Ability to communicate a decision in any way
It is critical that the person is supported in making a decision and communicating that decision. The fact that a person may need help in communicating a decision does not necessarily mean that they lack the capacity to make that decision. For example, a person may be able to communicate a decision by means of muscle movement, speech language or the act of a third party\(^1\). Consideration should be given as to the possible manner in which a person may communicate a decision. However, if a person cannot communicate their decision in any way at all, this is deemed to mean that the person does not have the capacity to make that decision.

It is important to note that a person is not deemed to lack capacity just because they make a decision which seems unwise. What matters is their ability to carry out the processes involved in making the decision and not the outcome or decision itself.

Finally, a person should also be supported to express their wishes, if any, in relation to the matters that are the subject of the decision. These wishes

\(^1\) The use of a third party should only relate to the act of communicating or assisting in communicating the decision. A third party in this instance is not to be construed as a co-decision maker.
should be formally recorded and submitted to the Court alongside the assessment of capacity.

7. Who may undertake an assessment of capacity?
An assessment of capacity must be undertaken by a medical practitioner. However, other healthcare professionals may be involved in the assessment.

8. What happens following an assessment of capacity?
When a medical practitioner has completed the assessment of capacity, they must prepare a report using the template attached at appendix 1 of this guidance document. The report must then be submitted to the Circuit Court by the person making the application.

The Circuit Court will require at least two separate reports by two separate medical practitioners in order to determine whether it should appoint a care representative. It may also hear other evidence relating to the health or circumstances of the person who is the subject of the application if it considers this necessary. Depending upon its determination, the Court may then make an order appointing a care representative. Where an application is not contested, the order appointing a care representative may be made by a county registrar rather than a judge.

9. Relevant Information
The following information is directly relevant to the decisions which are the subject of the assessment of capacity. Further information can be found in the Information Booklet on the scheme.

The Nursing Homes Support Scheme is a scheme of financial support for people in need of nursing home care (see section 1 above). Applicants to the scheme must undergo a care needs assessment to determine whether they need nursing home care and a financial assessment to determine their ability to contribute towards their own care. Based on the outcome of both these assessments, the HSE will decide on the payment of financial support.

One of the financial supports offered under the scheme is the Nursing Home Loan. This is essentially a loan advanced by the HSE to a person to help them meet the cost of contributions from assets such as their home. Its purpose is to ensure that a person does not have to sell their home or other land and property-based assets during their lifetime if they do not wish to do so.

For example, Jane has an income of €200 per week, savings of €36,000 and a house worth €250,000. She decides to apply for financial support under the Nursing Homes Support Scheme.

The full contribution payable weekly by Jane would be €520.58. This would be made up of €160 based on her income (80% of €200) and €360.58 based on her house (€250,000 x 7.5% = €18,750/52 = €360.58)

However, Jane does not have the portion of the contribution based on her house upfront and does not want to sell her home in order to obtain it. Jane, therefore, applies for, and receives, the Nursing Home Loan. This means that the HSE pays the €360.58 to the nursing home on...
Jane’s behalf each week. In other words, the HSE is giving Jane a loan of €360.58 per week to cover this portion of the contribution. The portion of the contribution based on her income must still be paid on a weekly/monthly basis to the nursing home.

In order to loan the money, the HSE requires security. It will, therefore, ask the applicant to consent to a Charging Order being placed against the house. This is a simple type of mortgage which is recorded in the Property Registration Authority. For example, it would be registered against the title deeds of the house. The Charging Order acknowledges the fact that the HSE has loaned monies, that the monies need to be repaid and that the debt is linked to the property in question. The HSE will be responsible for managing the Charging Order and for any costs associated with it. The applicant will not need to do anything (although the HSE may need to double-check with the applicant about the information in their application).

In general terms, the money loaned does not need to be repaid until:

1. after the person’s death, or
2. the property is sold or transferred, if this occurs before the person’s death.

However, the money may be repaid at an earlier stage if the person or their family so wishes.

The money is repaid to the Revenue Commissioners. The Revenue Commissioners are the collection agents for the HSE in relation to the Nursing Home Loan.

To return to our example, after Jane passes away, the monies loaned by the HSE will fall due for repayment. The personal representative administering Jane’s estate will ensure that the monies are repaid to the Revenue Commissioners in the course of undertaking all their duties in relation to the estate.

When the money is repaid, the HSE will remove the Charging Order from the property. This means that it will no longer be recorded against the property in the Property Registration Authority and it will be clear that the debt has been repaid.

The example above only considers the individual in need of care. However, Jane may have a husband, a partner or a relative who lives in the family home. She may be concerned about what will happen to this person depending on the decision she makes.

The Nursing Home Loan falls due for repayment on the death of the person receiving the support. However, the repayment may be further deferred by the person’s spouse or partner or by certain relatives (termed “connected persons”) living in the principal residence. This means that the spouse/partner/connected person will not have to repay the monies owed to the State for the duration of their lifetime.
If a person chooses to avail of the further deferral, the same procedure will apply whereby the money will be repaid by the family or personal representative of the person after their death.

For example, suppose Jane has a husband, Pat. Jane is deciding whether to avail of the Nursing Home Loan but she is concerned about the effect that her decision may have on Pat. The HSE explains to Jane that if she doesn’t opt for the Nursing Home Loan, herself and Pat will have to find the money upfront to pay the contribution based on the principal residence. If she opts for the Nursing Home Loan, she can defer these contributions for the duration of her lifetime and Pat can continue to live in the principal residence. If she dies before Pat, he can further defer payment of the monies owed to the State for the duration of his lifetime. The money will then only fall due on the death of Pat.

For more information on the persons who qualify as connected persons, on the care representative process or on the scheme in general, please contact the HSE Helpline on 1850 24 1850 or visit www.hse.ie or www.doh.ie. Further examples in relation to the financial assessment and the Nursing Home Loan are attached at Appendix 2 of this guidance document.

In conclusion, the reason for availing of the Nursing Home Loan is to defer contributions based on assets such as your house so that you don’t have to pay them during your lifetime. If a person doesn’t avail of the Nursing Home Loan, then they will have to find the money to meet these contributions upfront. This may require the help of family or friends. Alternatively, it may mean selling or privately mortgaging the property in question.

In order to avail of the Nursing Home Loan, a person or their care representative must consent to a Charging Order being placed against the property in question. This is necessary in order to secure the monies loaned by the HSE. The Nursing Home Loan cannot be paid if consent for the Charging Order is not provided.
Appendix 1

Nursing Homes Support Scheme Act 2009
Assessment of Capacity Report

Full name of Person assessed: ____________________________

Date of Birth of Person assessed: _________________________

Date of Assessment: _________________________

Section 1- Identification

1.1 Name and Professional Title of Person who undertook the assessment: _________________________
   (hereafter referred to as the “assessor”)

1.2 Name of Person assessed: _________________________
   (hereafter referred to as the “assessed person”)

1.3 Name of Person(s) who requested the assessment: _________________________

1.4 Relationship of Person(s) listed at 1.3 to Person listed at 1.2: _________________________

Section 2- Assessment of Capacity

2.1 Subject to section 2.2, the assessment of capacity relates only to the assessed person’s ability, at the time of the assessment, to make a decision relating to matters set out in section 21 of the Nursing Homes Support Scheme Act 2009. These matters are as follows:

   (a) making an application for Ancillary State support (the “Nursing Home Loan”),
   (b) consenting to the creation of a charge (“Charging Order”) in relation to the asset concerned, and
   (c) taking necessary actions in connection with the application for Ancillary State support, the creation of the charge and the registration of the charge in the Land Registry or the Registry of Deeds.

2.2 The assessment of a person’s ability to make a decision relating to a matter referred to in section 2.1 shall be based on the person’s ability:

   (i) to understand the information relevant to the decision,
(ii) to retain that information,
(iii) to use or weigh that information as part of the process of making the decision, or
(iv) to communicate their decision by any means (including by means of a third party).

2.3 State evidence and findings of the assessed person’s ability to perform each of the functions outlined at subparagraphs (i) to (iv) of paragraph 2.2 above. These should form the basis for the declaration made in section 4 of this report.

(i) Ability to understand the information relevant to the decision

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(ii) Ability to retain the information relevant to the decision

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(iii) Ability to use or weigh that information as part of the process of making the decision

________________________________________________________________________
(iv) Ability to communicate their decision by any means (including by means of a third party).

(A separate page may be affixed to this report providing further evidence and findings, or details of information provided by the assessor or by the assessed person in the course of the assessment.)

**Section 3- Expressed Wishes of Assessed Person**

Please state details of any wishes expressed in any manner by the assessed person at the assessment or otherwise, if known:
Section 4- Declaration

I declare that I, _______________________, have assessed the person listed at 1.2 above strictly in accordance with section 21 of the Nursing Homes Support Scheme Act 2009 and, in particular, on the basis set out in section 21(43) of that Act.

I further declare that, on the basis of that assessment, _______________________
(name of assessed person):

☐ did not lack the capacity to make a decision to which section 21 of the Nursing Homes Support Scheme Act refers (as outlined in paragraphs 2.1 and 2.2 of this report),

☐ lacked the capacity to make a decision to which section 21 of the Nursing Homes Support Scheme Act refers (as outlined in paragraphs 2.1 and 2.2 of this report),

at the time of the assessment.

I confirm that the evidence supporting my assessment is set out in section 2 of this report.

Signed: ________________________________(assessor)

Printed Name: __________________________

Professional Title: ______________________

Medical Council Registration Number: _____________________

Date: _________________________________
Appendix 2

Examples of Co-Payment under the Nursing Homes Support Scheme

Please note that these examples are for illustrative purposes only and are intended to assist medical practitioners in explaining the Nursing Home Loan and the implications of deciding to avail of the loan. They are not intended as a definitive guide to the Nursing Homes Support Scheme Act 2009. Medical practitioners may wish to use and adapt this information to the specific circumstances of individual applicants in order to help the latter in understanding the nature of the loan.

NOTES:

i. The cost of nursing home care varies. For illustrative purposes, the examples are all based on a cost of care of €1,000 per week.

ii. In the case of couples, the financial assessment is based on half of their combined income and assets, i.e. 80% of half the combined assessable income OR 40% of the combined income and 7.5% of half the value of the assets OR 3.75% of the combined assets. In addition, the asset disregard increases to €72,000.

Example 1

Mr. Smith, Single, House

Mr. Smith has an income of €250 per week and a house worth €250,000. He decides to apply for financial support under the Nursing Homes Support Scheme. Under the scheme, he will contribute 80% of his income each week towards the cost of care. This equates to €200 per week (i.e. 80% of €250).

He will also make a contribution towards his care costs based on his assets, in this case his house. This will amount to 7.5% of its value per annum or €308.65 per week (i.e. €250,000 - €36,000 (asset disregard) = €214,000 x 7.5% = €16,050/52 = €308.65).

This means that Mr. Smith’s must contribute €508.65 per week towards his cost of care. The cost of the nursing home is €1,000 per week. The HSE will pay the balance, i.e. €491.35 per week.

However, Mr. Smith does not have the contribution based on his house, i.e. the €308.65 per week, to pay upfront and does not want to sell his house. He, therefore, applies for and receives the Nursing Home Loan. This means that the HSE will pay the additional €308.65 on top of the €491.35 it is already paying per week. It is effectively giving Mr. Smith a loan of €308.65 every week. The HSE’s weekly contribution is now €800 (i.e. €308.65 + €491.35 = €800).

If Mr. Smith had not availed of the Nursing Home Loan, he would have had to pay the contribution based on his house, i.e. the €308.65 per week, upfront.

After three years, Mr. Smith’s house would be discounted from the financial assessment.
Example 2

Ms. Murphy, Single, House and Savings
Ms. Murphy has an income of €270 per week, savings of €56,000 and a house worth €250,000. She decides to apply for financial support under the Nursing Homes Support Scheme. Under the scheme, she will contribute 80% of her income each week towards the cost of care. This equates to **€216 per week** (i.e. 80% of €270).

She will also make a contribution towards her care costs based on her assets, i.e. her savings and her house.

When the asset disregard is applied to Ms. Murphy’s savings, only €20,000 remains to be taken into account (i.e. €56,000 - €36,000 = €20,000). The contribution towards her cost of care based on savings will amount to 7.5% of their value per annum or **€28.85 per week** (i.e. €20,000 x 7.5% = €1,500/52 = €28.85).

The portion of the contribution based on assets, i.e. the house, will amount to 7.5% of its value per annum or **€360.58 per week** (i.e. €250,000 x 7.5% = €18,750/52 = €360.58).

This means that Ms. Murphy must contribute €605.43 per week towards her cost of care (€216 + €28.85 + €360.58). The cost of the nursing home is €1,000 per week. The HSE will pay the balance, i.e. €394.57 per week.

However, Ms. Murphy does not have €360.58 per week to pay upfront and does not want to sell her house. She, therefore, applies for and receives the Nursing Home Loan. This means that the HSE will pay the additional €360.58 on top of the €394.57 it is already paying per week and is effectively giving Ms. Murphy a loan of €360.58 every week. The HSE’s weekly contribution is now €755.15 (i.e. €394.57 + €360.58 = €755.15).

If Ms. Murphy did not apply for the Nursing Home Loan, she would have to pay the contribution of €360.58 based on her house on a weekly basis during her time in nursing home care.

After three years, Ms. Murphy’s house would be discounted from the financial assessment.
Example 3

Mr. Byrne, Married, House, Savings and Rental Property

Mr. Byrne is married. He and his wife have a combined income of €440 per week from their pensions, savings of €12,000, a house worth €300,000 and a rental property worth €150,000 which generates a weekly rental income of €200.

Mr. Byrne decides to apply for financial support under the Nursing Homes Support Scheme. The financial assessment will be based on half of Mr. & Mrs. Byrne’s combined income and assets.

Therefore, he will contribute 40% of their combined income each week towards the cost of care. This equates to **€256 per week** (i.e. 40% of €640 which is comprised of their pensions + rental income).

He will also make a contribution towards his care costs based on his assets, i.e. his savings and both properties.

When the asset disregard is applied to Mr. Byrne’s savings, they are removed from the assessment entirely.

The portion of the contribution based on his two properties will amount to 3.75% of their value per annum or **€281.25 per week** (i.e. €450,000 - €60,000 (remainder of asset disregard) = €390,000 x 3.75% = €14,625/52 = €281.25).

This means that Mr. Byrne can afford to contribute €537.25 per week towards his cost of care. The cost of the nursing home is €1,000 per week. The HSE will pay the balance, i.e. €462.75 per week.

However, Mr. Byrne does not have €281.25 per week to pay upfront and does not want to sell his house. He, therefore, applies for and receives the Nursing Home Loan. This means that the HSE will pay the additional €281.25 on top of the €462.75 it is already paying per week and is effectively giving Mr. Byrne a loan of €281.25 every week. The HSE’s weekly contribution is now €744 (i.e. €281.25 + €462.75 = €744).

If Mr. Byrne did not apply for the Nursing Home Loan, he would have to pay the contribution of €281.25 based on his properties on a weekly basis during his time in nursing home care.

After three years, Mr. Byrne’s principal residence would be discounted from the financial assessment. The rental property would continue to be included.

The loan will become repayable on Mr. Byrne’s death. However, if Mr. Byrne dies before his wife, she can further defer repayment of the Nursing Home Loan for the duration of her lifetime.