

# A “just” approach to uncertainty in mental health and capacity practice and policy

*Findings from a Policy Lab*

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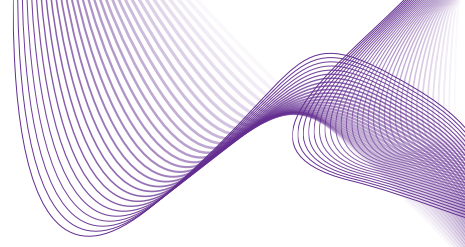
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# Introduction



An effective healthcare system needs to fulfil two fundamental duties: protecting people in circumstances where they might be vulnerable, while also respecting their agency and autonomy. Managing uncertainty in making decisions about individuals' care is at the heart of balancing these duties. However, decisions often take place under time pressure and require professionals to exercise discretion in selecting a particular course of action from a range of 'reasonable' responses.

It may be possible to support better decision-making in some of these circumstances by developing a "just" approach that acknowledges uncertainty, respects the individual, achieves informed participation and reaches a timely conclusion. To this end, we convened a Policy Lab to address the following question:

*Where there is significant uncertainty affecting a decision in the mental health and capacity context, what would we aspire to as a "just" approach and how could different mechanisms support this?*

There are many dimensions of uncertainty, and decisions taking place under uncertainty may have different levels of risk. In the Policy Lab we focused on decisions where there is high uncertainty but not high immediate risk, as this space provides the most scope to invest time and effort in ensuring a "just" approach to decision making. This briefing summarises the key ideas produced, while accompanying appendices include a more detailed record of the day's discussion and the briefing pack circulated to participants in advance.

## What is a Policy Lab?

The Policy Lab approach was developed by the Policy Institute at King's College London as one way of narrowing the gap between evidence and policymaking (see Hinrichs-Krapels et al., 2020). Policy Labs are collaborative sessions that bring together research, policy, practitioner and experiential expertise to assess the evidence, understand barriers and constraints to change, and use this understanding to inform policy options that can help improve outcomes. They tend to work best when focused on a specific, well-defined issue or challenge, and draw out a wide range of perspectives and views to ensure that options and ideas are challenged and deliberated. The Policy Lab approach has been applied by the Policy Institute across a wide range of areas including, for example, reducing the costs associated with rising levels of Type 2 diabetes, and reducing and preventing mental health problems associated with bullying, as well as previously in the [Mental Health and Justice project](#) to feed into reforms of the Mental Health Act.

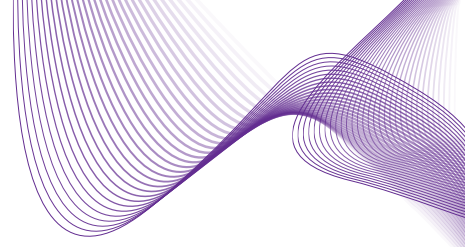
### **What do we mean by uncertainty in decision-making?**

In the mental health and capacity context, professionals may need to make rapid decisions in relation to, for example, whether a person has or lacks the capacity to make decisions about their own care, or whether others may be supporting or coercing them in doing so. In situations where an individual is considered not to have capacity, there may then be decisions around the best course of action to adopt and the appropriate legislation to apply in each situation (eg, in England & Wales, whether the Mental Health Act 1983 or the Mental Capacity Act 2005 is appropriate). Potential future practice examples might include, for example, consideration in England and Wales under the Mental Health Act 1983 of Advance Choice Documents in relation to treatment and identification of a person's preferences in cases of cognitive impairment.

These situations are affected by a range of different uncertainties, which might include:

- the time within which the decision has to be made
- the factual information used to shape the decision
- potential outcomes of the decision
- explicit issues of value uncertainty (eg weighing up competing values)
- tacit issues involving value uncertainty (eg heuristics for action or paralysis reactions)
- the quality of the evaluation or judgement (biases, perverse incentives, fear of liability, etc).

# The key principles



A starting hypothesis for the policy lab was that a “just” approach to uncertainty in decision-making is one which does both **substantive** and **procedural** justice to the interests at stake. From this starting point, several principles emerged from discussions in the lab.

## 1. Acknowledging and embracing uncertainty

For professionals, motivations to deny or minimise uncertainty can arise from reputational and professional risks of being “wrong” or not knowing. It was noted that uncertainty is framed almost exclusively negatively, as something to be managed, tolerated, etc, rather than as a source for creativity or potential solutions. Acknowledging that it is “ok to not know” may create more opportunities to explore alternative pathways from which better decisions and other solutions might emerge.

## 2. Respecting individuality

A “just” approach fundamentally requires respect for individual autonomy and prioritisation of “will and preference”. This must account for both historically expressed wishes and the potential for changed views thereafter. It must also be applied when people are lacking support networks or have unusual presentation, as well as when differing values from professionals involved might result in disagreement on the best course of action.

## 3. Striving for a “Goldilocks” approach to timeliness

Decision-making should be fast enough that people are not left in limbo, but not unnecessarily rushed. As the level of urgency decreases, taking more time can be beneficial for accessing more information, allowing emotions to “settle” and moving professional mindsets out of “emergency mode”.

## 4. Informed participation

A collaborative approach to uncertainty should be sought by including all relevant voices appropriately. This requires effort to gather all relevant views, not excluding anyone without good reason. To make the most of these contributions, it is necessary to ensure that all parties have sufficient awareness and understanding of the process, as well as any necessary psychological support.

## 5. Objectivity and impartiality

A “just” approach would be objective, impartial and non-discriminatory. One of the biggest factors in securing this is establishing who should be making decisions, respecting the potential diversity of people’s views and affording appropriate weight to them in arriving at a decision. For treatment decisions, achieving objectivity and impartiality also requires that the assessment of capacity is not linked to the patient agreeing with the physician’s view as to the best course of action, as noted above.

## **6. Adequate resourcing**

One of the first considerations in pursuing a “just” approach should be the resources needed to work through all the necessary procedures, including undertaking assessments, providing support for the individual, gathering all relevant views, etc. While there will always be resource constraints, knowing that decisions are premised on protecting rights offers a way of rationing resources that is sustainable and gives people confidence. Accordingly, addressing this at the outset is particularly important since decisions made early in the process may determine access to further resources down the line (eg an initial decision on whether a person has capacity), while sufficient upfront resourcing may also help avoid the very high costs associated with subsequent escalation to the courts in some cases.

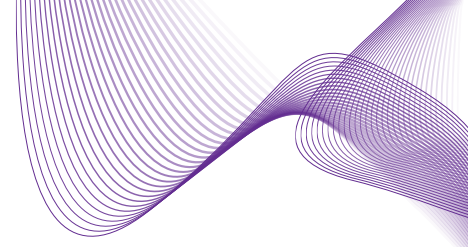
## **7. Transparency, reasoning, and “challengeability”**

There should be clarity in advance about how the process will be run. The process should be open in hearing evidence and reflecting on the quality of this evidence. Actions and decisions – including deciding not to do something – should be able to be questioned and tested.

## **8. Flexibility and learning**

Situations are dynamic, and decision-making should be flexible enough to incorporate new information. Feedback – to all stakeholders – on the outcomes of process, actions, and decisions is essential to learning. The success of such an approach requires ongoing engagement and open communication with all parties.

# Actions to support a “just” approach



Based on the principles set out, the lab identified actions that institutions and stakeholders could implement to support a “just” approach to decision-making in cases with significant uncertainty.

## 1. Law

Legislation could be used to provide guidance on the weight to give to different, competing values and give legal effect to positive rights, thereby opening up options for alternative solutions. It can also identify a minimum set of downstream resources that should be available in meeting a person’s needs.

## 2. Courts

Court processes should use technology to improve access and participation, and should take place in an appropriately timely manner to avoid creating false urgency. Decision-makers should be properly supported and trained, including feeding back to judges what has happened in their cases and ensuring sufficient exposure to cases to drive consistency.

## 3. Organisations

Decision-makers should be properly supported and trained, for example through experiential simulation learning, and institutional knowledge should be easily available to individual staff. Evidence gathering should be prioritised early.

## 4. Practitioners

Practitioners should explicitly acknowledge that uncertainty is inevitable and so aim to be flexible and creative in responding to dynamic situations. They should be cognisant of potential value clashes, adaptable where possible, and seek to clarify the potential outcomes of different decisions.

## 5. Other

Communications should be available in multiple formats (eg videos as well as leaflets) and accessible training provided on understanding processes around things like Advance Decisions to Refuse Treatment. Experimenting with novel approaches, such as mediation analogues or mock panels, could help build experience and foster learning amongst professionals.

The figure on the next page maps these actions to promote better decision-making under uncertainty onto different points in the process as they might apply to a specific decision in relation to an individual. The nature of the decision is deliberately not specified, but could be envisaged as any interaction between professional(s) and an individual who may be in some form of crisis or have some form of need to be met.

# The learning cycle

Using this map it would be possible to generalise to identify steps to support each of the actions, as it is anticipated that bodies or organisations applying such a map would have to make such decisions on a regular basis. Note that many of the actions suggested take place not at the point when the decision is made, but either much earlier, facilitating the conditions for good decision-making, or later, as part of a reflexive process.

## Capability building

**Training** of practitioners, judges and others to embrace uncertainty, respect rights, etc

**Adequate resourcing secured**

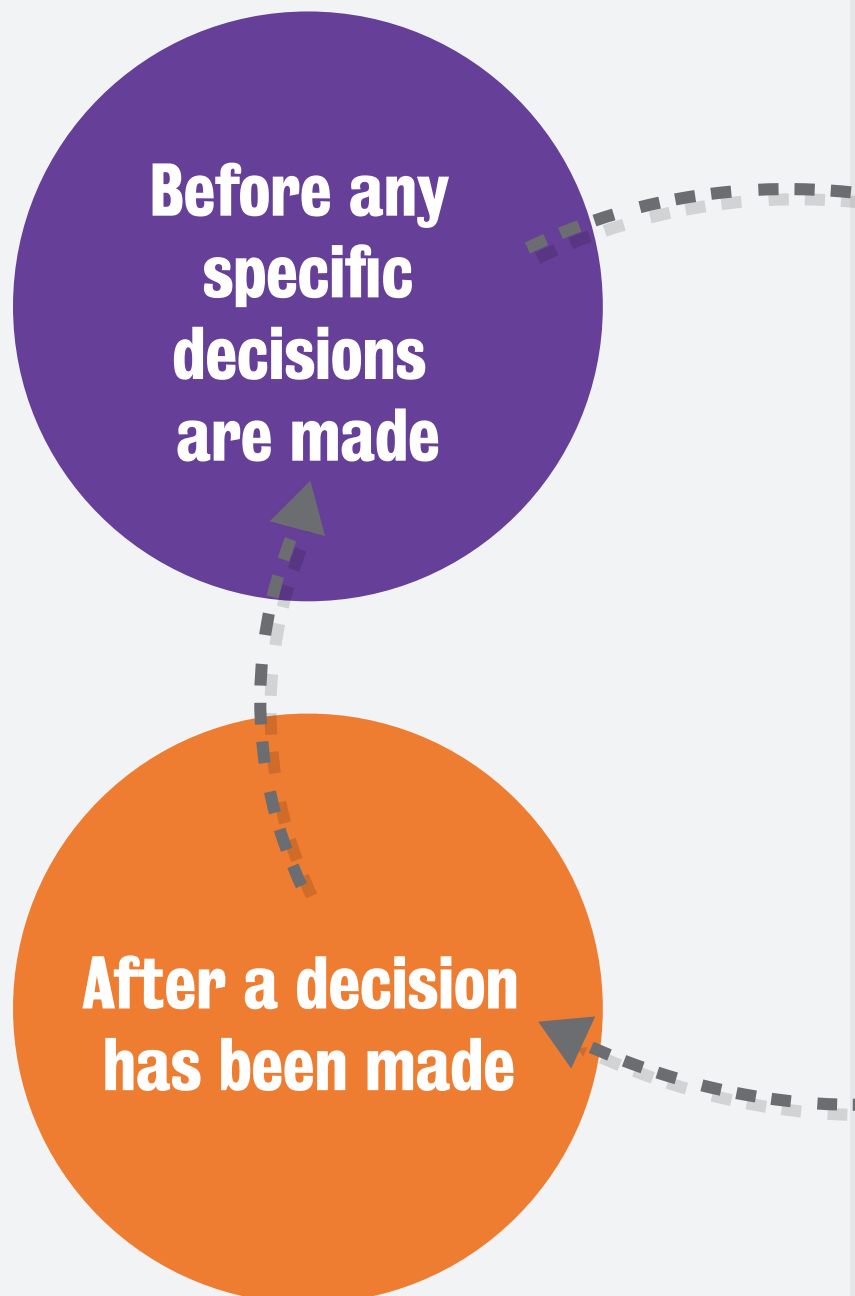
**Processes and materials developed**, eg, remote connections to proceedings, document institutional knowledge, prepare flexible leaflets/videos, minimum downstream resources in place

**Feedback to decision-makers about outcomes**

Link feedback process to forward planning – are any systems level (c.f. individual decision-maker) changes necessary?

**Before any specific decisions are made**

**After a decision has been made**





# Individual case



**When a decision  
is on the horizon**

Ascertain an individual's **preferences**

Identify who will need to **input** into the decision



**When a decision  
is necessary**

Need to be **timely** but **unrushed**

Respond to uncertainty with **flexibility** and **creativity**



# Mental Health and Justice

Mental Health and Justice is a Wellcome-funded collaborative research endeavour spanning psychiatry, law, ethics, neuroscience, social science/public policy and service user involvement. The project takes an interdisciplinary approach to two fundamental duties: the duty to protect people in contexts where they can be vulnerable and the duty to respect their agency and autonomy.

 [@MHealthJustice](https://twitter.com/MHealthJustice)  [mhj.org.uk](https://mhj.org.uk)

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