



Practical Guide to Assessing Capacity and Making Best Interests Decisions under the Mental Capacity Act (MCA) 2005

Version 3

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Overview

- Principle 1 of the MCA is the **presumption of mental capacity**. However, if a person's mental capacity to make decisions is in doubt, professionals **MUST** follow the Mental Capacity Act 2005 [MCA].
- The ethos of the MCA, along with all effective Human Rights based practice, is to work **with** people, rather than do things **for** people.
- This brief guide provides practical steps to support professionals in following the MCA process. It is not intended to be definitive guidance - please refer to your **own organisation's** MCA Policy and Procedures, as well as the [MCA Code of Practice](#) for further information.
- **Mental Capacity must be assessed**, even if it is largely agreed that a person does not have mental capacity to make decisions across most areas of their life; **to do otherwise, is to Act unlawfully and could constitute a breach of Human Rights**.

Identify the decision

- **Remember** – it is the **person's** decision, not the **professional's** decision
- **There may be more than one decision that the person needs to make**
- It is helpful to phrase the decision from the **viewpoint of the person**, avoiding any preconceived opinion on what is in that person's best interests.
- It is important to frame the decision correctly and for all options and alternatives to be explained in a way that is easier for the person to understand. For example, in relation to a move into a care home the decision is about **residence (and care)** - therefore the decision to be made is not whether or not to move into a care home, as this is just one option out of several; other options may include returning home with package of care; moving to extra care housing and other alternatives.

✓	What should my care arrangements be?
✓	Should I have this medication?

✗	As he is not safe on his own, should Mr Jones be admitted to Sunny View Care Home?
✗	Should Mr Jones receive the necessary medication to alleviate his symptoms?

Identify the decision maker

If the person HAS mental capacity, they are always their own decision-maker

Identify if there is a relevant Lasting Power of Attorney for which they may be the decision-maker

The decision maker needs to be identified at this stage because they are the one who must have a **reasonable belief** about the adults' mental capacity in relation to the decision being made. This **reasonable belief** provides the lawful basis for actions taken or not taken - either on the basis of the adults **valid consent** (if they are capacitated), or on the basis of it being in their **best interests** (if not capacitated).

This means that a decision maker is often also the person who is assessing mental capacity to make a particular decision; they may delegate the capacity assessment to another person (for example, a speech and language therapist), but it remains the decision maker who requires the **reasonable belief** about mental capacity, whether or not they are relying on their own or another's' MCA assessment.

For these reasons, a decision maker needs to be identified before an assessment under the MCA is commenced.

Remember - if the person has a relevant & valid **Lasting Power of Attorney (LPA)** or **Deputyship**, then the LPA or Deputy will be the likely decision-maker.

All decision makers must follow the same statutory process in determining mental capacity and best interests (where indicated), including LPA's. Further information and advice is available in the [Mental Capacity Act Code of Practice](#).

Type Of Decision	Likely Decision Maker
Change of Accommodation / Discharge Care Plan	Funding body or Social Care Professional; always consider the person's prior views & wishes
Medical Investigation or Treatment	Medical Professional; NB; is there a valid Advance Decision To refuse Treatment [ADRT]
Daily Care	Nurse, Therapist, Care worker
Managing Risk to Self	Police, Housing Worker, Social Worker
Finances	Funding body, such as Local Authority or ICB

Remember – Professional / Funding Decisions and Best Interest Decisions are not the same thing. In order to assess capacity and determine best interests, you must first identify available options. The MCA does not simply bestow a 'wish-list' of options for a person to choose from. Available options are often identified following professional decisions and /or funding decisions.

Be mindful to provide all the available options - these often span from no intervention to significant intervention. All available options should be offered for consideration even if some of these are believed to involve a degree of risk.

Options are usually identified following an assessment; for example, if medical treatment is being considered this is likely to be in response to a test that has already been completed. The assessor needs to present information to the adult about the potential repercussions of making one decision over another, or of making no decision at all; these often involve a discussion around risk, the assessor must consider this before commencing the MCA assessment.

Assessors should include options where an element of risk may remain - for example, if a person has assessed social care needs for 24-hour support but makes a capacitated decision to return home they will have periods of unmet needs; the assessor should identify the potential risk of having these unmet needs and present options for reducing this where possible.

It can be useful to consider the decision(s) across a range - from simple decisions, through to more complex decisions.

Simple	For example, day to day decisions about daily care, what clothing to wear or food to eat etc
Complex	Decisions such as: <ul style="list-style-type: none"> • Changing accommodation? • Restricting contact with Others? • Receiving covert medication? • Receiving serious medical treatment? • Receiving care/treatment against the person's wishes? • Financial arrangements?

Assess Capacity

The Code of Practice suggests that if we have reason to believe that a person does not have the capacity to make a decision **because of** an impairment or disturbance of the functioning of the mind or brain, then we should assess Mental Capacity.

Sometimes when working with individuals they may make unwise choices, & the MCA reminds us that if a person makes an unwise decision it does not mean they lack capacity (MCA Principle 3.) However, if a person makes frequent unwise decisions, this could indicate fluctuating capacity or an issue with executive functioning and should trigger a Mental Capacity Assessment. This is particularly important in adult safeguarding cases relating to self-neglect and/or chronic substance misuse. Recognising that capacity can fluctuate is important and it's essential to assess decision-making ability at different points in time. Some people's ability to make decisions fluctuates because of the nature of a condition that they have. This fluctuation can take place either over a matter of days or weeks (for instance where a person has bipolar disorder) or over the course of the day (for instance a person with dementia whose cognitive abilities are significantly less impaired at the start of the day than they are towards the end). This would further highlight the importance of not only carrying out one single assessment but also carrying out assessments at various times throughout the day.

Remember - The starting point for any assessment of mental capacity is that the adult is presumed to have capacity to make the decision for themselves. This means that they do not have to demonstrate their ability to make the decision, rather it is for the assessor to gather information to determine whether this presumption can be displaced. The assessor must reach a conclusion about mental capacity **on the balance of probabilities**. If they have not reached this standard, then the presumption of capacity remains.

Before undertaking an assessment of mental capacity, the adult needs to be informed that they are having an assessment under the MCA and informed about the decision they are being asked to make. An adult can decline to have an MCA assessment, however this does not mean that an assessment will not be completed - rather the assessor may need to rely on collateral information when forming an opinion of the adult's mental capacity in instances where the adult refuses to engage with formal assessment.

It is helpful to think of the capacity assessment as a **conversation** between the person and the decision maker. The decision maker needs to take all **practicable steps** possible when facilitating the conversation, so that the person has the best opportunity to make the decision by themselves (*MCA Principle 2.*) We cannot prove that someone lacks capacity to make the decision, without taking all practicable steps.

A capacity assessment is not a clinical test and is ideally completed by a decision maker who knows the person, is involved in their care and has awareness of the particular decision at hand. The conversation should commence with the decision maker outlining the relevant factors of the decision, and then ascertaining if the person can **understand, retain, weigh and communicate** those factors and the overall decision. What is and is not relevant to making various decisions is a matter of law and further information and advice in relation to this is available from a variety of resources. If the person is **unable to either** understand, retain, weigh or communicate factors related to the decision, **and the reason for this is directly linked to an impairment of the brain or mind, then the person is deemed not to have mental capacity to make that decision.**

Anyone assessing someone's capacity to make a decision will need to apply the test in the Act. It can be broken down into three questions:¹

Stage 1 – Is the person unable to make a specific decision when they need to? (Functional Test)

Stage 2 – Does the person have an impairment of, or a disturbance in the functioning of their mind or brain? (Diagnostic Test)

¹ The ordering of the first and second questions set out above is the opposite to that set out in the Code of Practice as it stands at present, however The Supreme Court in *A Local Authority v JB* confirmed, that it is necessary to start with the first question. See [A Local Authority v JB \[2021\] UKSC 52](#) at paragraph 79. The Supreme Court collapsed the second and third questions into one, but in practice, it is useful to break them down.

Stage 3 - Is the person's inability to make the decision because of the identified impairment or disturbance?

The diagnostic issue may not cause the functional problem in all cases, so a link must be shown. (The 'causative nexus').

Remember – the starting point of the assessment is that the person has capacity (*MCA Principle 1*).

Remember - the adult being assessed and the assessor may give different weight to information about the decision; this in itself does not indicate that the adult lacks mental capacity and assessors need to be mindful of the 'protection imperative' whereby assessors often seek to protect people they view as vulnerable; this can result in assessors concluding that an adult lacks mental capacity when the adult chooses an option which involves risk.

Executive Functioning

Executive function is an umbrella term used to describe a set of mental skills that are controlled by the frontal lobes of the brain. **When executive function is impaired, it can inhibit appropriate decision-making and reduce a person's problem-solving abilities.**

A common area of difficulty is where a person with, for example, an acquired brain injury gives coherent answers to questions, but it is clear from their actions that they are unable to give effect to their decision. This is sometimes called an impairment in their executive function. The executive functions comprise those mental capacities necessary for formulating goals, planning how to achieve them, and carrying out the plans effectively.

People with executive impairment can often present very well in a formal assessment of cognition and capacity. They can often mask their deficits, and often be unaware they are doing so. Despite this, there are often signs that they still struggle in day to day life. This is known as the '**frontal lobe paradox**'. If the person cannot understand (and/or use or weigh) the fact that there is a difference between what they say and what they do when required to act, it can be said that they lack capacity to make the decision in question. However, this conclusion can only properly be reached when there is clear evidence of repeated difference between what the person says and what they do. This means that in practice it is **unlikely to be possible to conclude that the person lacks capacity as a result of their impairment on the basis of one single assessment.**

It is important to seek expert or legal advice where it is considered that a person may be subject to coercion or control by others, and/or is misusing substances such as drugs and alcohol, and there is grave concern regarding the decisions they are making that raises questions about their executive functioning. **Professional curiosity is fundamental in situations where executive functioning is questioned.**

Best Interest Decision

If a person **does not** have the mental capacity to make the decision, then a decision is made by the decision-maker in the persons **best interests** (*MCA Principle 4*). The MCA Code of Practice Best Interests checklist outlines what must be considered when making a decision in a person's best interests.

A Best Interest decision should take into consideration the **past and present views of the person, and their values and beliefs**. A decision maker should also consult with individuals who are important in a person's life, such as their family or friends. This may include people who disagree with the opinions of professionals, or may be subject to safeguarding enquiries in relation to the adult; such people should not automatically be excluded from the best interests decision making process and it is best practice to gather views from a wide variety of people involved in the adults' life.

A Best Interest decision will often be a multi-agency process, with the views of a range of professionals also being consulted particularly around more complex decisions.

When making a Best Interest decision, decision makers should demonstrate consideration of a range of options and where possible should demonstrate that they have considered the least restrictive option (**MCA Principle 5**). The least restrictive option is not always the option chosen; if this is the case use your best interest decision to evidence that you have considered it but explain why it is not the best interest option.

Remember – There are some best interests' decisions which are beyond the scope of best interests decision making; for example decisions about having sex or getting married. In these instances, a mental capacity act assessment may be required, but if the person lacks mental capacity to make the decision a decision to engage in these acts cannot be made in best interests.

Recording the MCA & Best Interests Decision

When recording the MCA your assessment should evidence what decision is being considered & how you have proven lack of capacity using the two-stage test. When recording a Best Interest Decision this should be documented (using your own agencies documents) to evidence that you have considered the persons views, consulted appropriately with them & others including other professionals and that you have considered a range of options including the least restrictive.

Simple Decisions	It is required practice to make reference to Capacity / Best Interests assessment or decision in care records even for simple care decisions, although detailed recording is not usually expected.
Complex Decisions	More formal documentation is necessary. Recording for these decisions is required to be more in-depth and demonstrate how a particular conclusion was reached during the capacity assessment, as well as best interest considerations as outlined in the Best Interest checklist. A balance sheet approach is suitable in demonstrating your consideration of different options, where you can demonstrate the benefits and burdens of each option in showing how the decision was made.

Further Resources

Useful reference materials can be found here:

- www.39essex.com
- www.mentalcapacitylawandpolicy.org.uk
- [Mental Capacity Act 2005 Resource and Practice Toolkit \(proceduresonline.com\)](http://MentalCapacityAct2005ResourceandPracticeToolkit(proceduresonline.com))
- [Mental Capacity Act Resources | Teeswide Safeguarding Adults Board](http://MentalCapacityActResources|TeeswideSafeguardingAdultsBoard)

Template Revision Number	Date Approved by the Board	Change Record	Links to Other Policies	Review Date:
V3	June 2025	Full Review – Addition of Executive Functioning, Fluctuating Capacity and Learning from SARs	All other Teeswide Policies and Procedures	June 2027