

Mental Capacity: What Practitioners Need to Know

Timely and robust assessments of mental capacity are vital to effective safeguarding work. The Mental Capacity Act 2005 applies to people from the age of 16. This briefing is aimed at all professionals and volunteers to improve confidence and knowledge. Packed with hyperlinked resources and practice guidance.

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What is Mental Capacity to Make a Decision?

Decisions are sometimes simple and sometimes complex. But the **activity of making decisions**, for **all people**, in **all situations**, requires the **same key abilities**:



- ♦ to **understand** relevant information, including the foreseeable consequences of the
- ♦ decision to **retain** the relevant information for long enough to reach a decision
- ♦ to **weigh and use** the relevant information in reaching the decision.
- ♦ **A person needs to be able to do all these things at the moment they actually need to make and enact the decision.**

Mental capacity is **decision-specific** and **time-specific**. This means people can have **capacity to make one decision but not another**, and their capacity can **change over time**.

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Key findings from Safeguarding Adults Reviews

Safeguarding Adults Reviews take place when an adult with care and support needs has died as a result of abuse and neglect or has suffered serious abuse. These reviews look at the work of all involved agencies and professionals to identify learning that can be used to improve practice for other adults at risk.

In the National Analysis of Safeguarding Adults Reviews shortfalls in the application of the Mental Capacity Act was an issue identified in the majority of the serious cases.

The authors urge practitioners to: "*pay close attention to mental capacity, carrying out capacity assessments where indicated, particularly where an individual consistently disregards high levels of risk to themselves or others. The potential impact of impaired executive brain function on decision-making may also need to be considered*".



"Learning from Barnsley Safeguarding Adult Reviews A thematic review of the 6 SARs and 11 Learning Reviews undertaken by the Barnsley Safeguarding Adult Board since 2018 found that:

' in 10 of the 17 cases, there was a lack of evidence to support the robust use of the Mental Capacity Act'



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The Five Principles of the Mental Capacity Act 2005

Principle 1: A person must be assumed to have capacity unless it is established that s/he lacks capacity.

When applying this principle it is vital to know when to set aside the assumption and take steps to assess capacity.

Principle 2: A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

This is usually going to be more than one conversation and will often require respectful challenge and frank discussion about risks.

Principle 3: A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

Nonetheless, unwise decisions can indicate a reason to doubt capacity. Risky decisions should not be written off as "lifestyle choice" without exploration and challenge.

Principle 4: An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in their best interests.

Challenge anyone who is not acting in the persons best interests, including those with Lasting Power of Attorney or a court appointed deputy.

Principle 5: Any act done in a person's best interests must consider whether the same outcome could be achieved in a less restrictive way.

Compare options and consider which is least restrictive. For example, care and treatment at home versus care and treatment in hospital.

Mental Capacity Toolkit:

Bournemouth University and Burdett Trust for Nursing have developed a Mental Capacity Toolkit. Find more information about the principles and applying them in practice by clicking on the icon



When To Doubt Capacity

Principle 1 says a person must be assumed to have capacity unless it is established that s/he lacks capacity.

But what does this actually mean in practice? Are we getting it right?

The House of Lords Select Committee found that the assumption of capacity *"is widely misunderstood by those involved in care. It is sometimes used to support non-intervention or poor care, leaving vulnerable adults exposed to risk of harm... this is because professionals struggle to understand how to apply the principle in practice."*

Setting the threshold for doubt too high puts people at unacceptably high risk of harm.

The Mental Capacity Act Code of Practice sets the threshold for doubting capacity quite low.

We can doubt someone's capacity if:

The person's behaviour or circumstances cause doubt as to whether they have the capacity to make a decision, e.g. unwise decisions, especially those that expose the person to risk. It is not sufficient to assume such decisions are "lifestyle choices" without respectful challenge and exploration of the person's reasoning and background information.

Somebody else says they are concerned about the person's capacity, e.g. a family member, another care giver or professional.

The person has previously been diagnosed with an impairment or disturbance that affects the way their mind or brain works, and it has already been shown they lack capacity to make other decisions in their life, eg where someone who has been found to lack capacity to decide what care they need, doubt is cast on their ability to make financial decisions.

You do NOT need to know of a diagnosis of mental disorder or impairment BEFORE you doubt someone's capacity. This is a common misconception that hampers best safeguarding practice.

Important note : to doubt capacity is not the same thing as deciding someone lacks capacity.

What sort of behavior or circumstances cause doubt about someone's mental capacity?

- Fred is signing ownership of his house over to a virtual stranger.
- Ade refuses to throw away any of his rubbish and it's piling up in his home.
- Priti falls a lot but is refusing help from a physiotherapist.
- Eva refuses help with applying for benefits although she has no money for food.
- Sue refuses nursing care despite worsening pressure sores
- Aziz misuses his insulin injection and is refusing help to check.

What to do when you doubt someone's mental capacity to make a decision

Whatever your professional role, it is important to start by taking all practical steps to help them to make that decision themselves.

The sort of steps you should take will be specific to the person's individual circumstances and needs.

Think about:

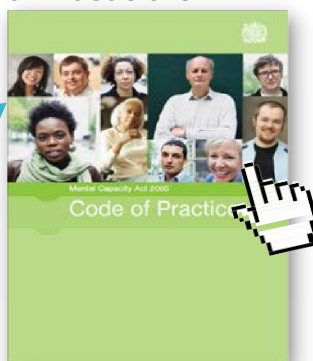
their communication needs, what

- ♦ information they need
- ♦ the best way to present the relevant information to them how to
- ♦ help them feel most at ease
- ♦ someone who knows them well who can assist them. the
- ♦ best time and place to talk to them
- ♦ Ask yourself: Are they likely to recover their ability to make decisions at some point in the future? Can the decision be delayed until then?

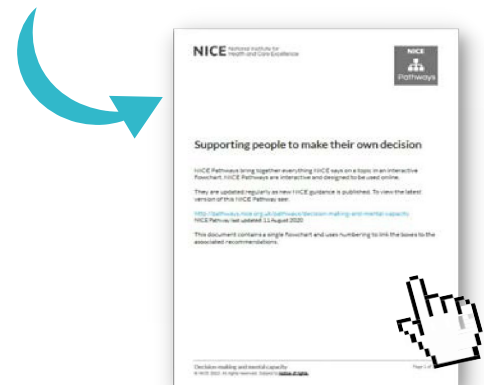
You may need to involve a Speech and Language Therapist or an interpreter in a different language or sign language



Chapter 3 of the Mental Capacity Act Code of Practice gives lots of guidance and ideas on how to support people to make their own decisions.



NICE guidelines for supporting people to make their own decisions.



Who Should Assess Mental Capacity? It depends on the decision and the context!

It depends on the decision and the context!

For day-to-day decisions, such as what to have for lunch or what to wear, the person providing direct care at the time should be assessing capacity at the time the decision needs to be made.



For medical decisions, the doctor or relevant healthcare professional who proposes a treatment or an examination, eg GP, district nurse, dentist, must assess the person's capacity to consent to that.

Tip: If you doubt someone's capacity to make a medical decision, inform the relevant medical professional of your concerns

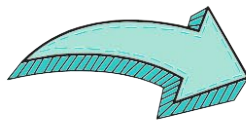
There are a range of other decisions, particularly those which have a significant impact on someone over time, which need someone with more experience and relevant expertise to assess mental capacity, such as a social worker.



Sometimes, where there is a dispute about an assessment of capacity, independent experts need to be consulted, and in rare cases the determination of capacity needs to be made by a judge in the Court of Protection.

If you have concerns in relation to an adult's mental capacity to make a decision about:

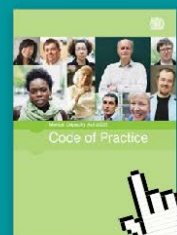
- Safeguarding support
- Housing/accommodation
- Financial decisions
- Care and support such as help with personal care or meal preparation.



Discuss your concerns with your organisation's adult safeguarding lead.

When you discuss your concern provide as much information as you can about the reasons for your concern, the steps you have taken to explore the issue with the person and the decision(s) to be made.

Chapter 4 of the Mental Capacity Act Code or Practice gives guidance on who should assess capacity in any given situation
use link above



How to Assess Mental Capacity

The assessment is a two-stage test:

Stage One:

Does the person have an impairment or disturbance in the way their mind or brain works? This could be .

Examples of impairments or disturbances of the mind or brain

Phobias

Anxiety

Personality Disorders

Learning Disability

Depression

Dementia

Alcohol related brain

Brain

Schizophrenia

damage

damage

a

Tips for best practice:

You may need to proactively make enquiries about diagnosis or raise concern about the need for a clinical assessment if there is no diagnosis.

Professional curiosity and interdisciplinary communication is critical to this assessment.

Stage Two:

If so, does that impairment or disturbance cause that person to be unable to make the decision in question at the time it needs to be made?

To make the decision they need to be able to:

- ◆ Understand the relevant information, including understanding the foreseeable consequences of the decision? and
- ◆ Retain the relevant information for long enough to reach a decision? and
- ◆ Weigh and use the relevant information to reach a decision? Note: This is one of the trickiest parts of a capacity assessment. See note below and the section on Executive Capacity.
- ◆ and communicate their decision?

What does "weigh and use" mean? The Mental Capacity Act Code of Practice (para 4.21) says: 'For someone to have capacity, they must have the ability to weigh up information and use it to arrive at a decision. A person must accept the information and take it into account. A person may appear to be able to weigh facts while sitting in an interview setting but if they do not transfer those facts to real life situations in everyday life (executing the plan) they may lack mental capacity.'

Best Practice

How you find answers to these questions will vary from assessment to assessment. You may need to speak to the person once, or several times. You should consider information from other sources including people who know the person and take account relevant background information too.

The determination of capacity must be made on the balance of probabilities – is it more likely not that the person lacks capacity?

You must record how and why you have come to the conclusion that the person lacks capacity to make the particular decision.

Chapter 4 of the Mental Capacity Act 2005 Code of Practice gives guidance on how to assess capacity in any given situation.



Tricky Issues and Challenges

There are sometimes confusing and complex challenges for practitioners when assessing capacity. These challenges often surface in cases of self-neglect such as hoarding and refusal of care and support.

Fluctuating capacity

Some people's mental capacity fluctuates because of the nature of a condition that they have. For example, people with dementia are often more lucid in the morning than the evening. Depending on the condition, fluctuation can take place over a matter of days or weeks, or even over the course of the day.

When does the decision need to be made?

To establish how to apply the Mental Capacity Act when someone has fluctuating capacity it is important to establish when and how often the decision needs to be made. Is it a one off or a repeat decision? NB The decision does not usually need to be made at the point of an assessment interview, but rather at the point a decision needs to be executed.

With repeated decisions, such as management of property and affairs, or managing diabetes day to day, requiring multiple 'micro-decisions' each day, if there are only limited periods during the course of each day or week that the person is able to make their own decision, then it will usually be appropriate to conclude they lack capacity to make the repeated decision.

"Executive Capacity" - what does it mean? How do we assess it?

Sometimes a person can give coherent reasonable answers to questions during assessment that indicate they can understand, retain, and weigh and use relevant information in the abstract. However, they may be unable to execute the decision in a real world situation. This can happen if their executive function is impaired.

There is an important distinction between decisional capacity, when considering the decision in the abstract, intellectually, and the executive capacity to execute or act on the decision in the real world at the material time the decision needs to be made. In the moment, abilities to recall and weigh and use relevant information can be significantly impaired by conditions such as acquired brain damage, stroke, dementia, and rapidly fluctuating conditions.

In order to have mental capacity to make a decision a person needs both decisional AND executive capacity.

Insufficiently detailed capacity assessments can expose the person to substantial risks. In complex, risky or contentious situations, such as self-neglect and hoarding, an interview-only approach is not sufficient to assess executive capacity. Take account of information about the person's real-world behaviour from family, care givers and other third-party information sources.

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Making Decisions in Someone's Best Interests

One of the key principles of the Act is that any act done for, or any decision made on behalf of a person who lacks capacity must be made in that person's best interests. That is the same whoever is making the decision.

Throughout the process of best interest decision making you should encourage and support the person to participate in the decision making as much as they are able.

To support participation there are some decisions that require you to arrange an Independent Mental Capacity Advocate (IMCA). For decisions about major medical treatment or where the person should live, including a move to a care home or supported accommodation, and where there is no-one suitable to consult in their informal network, an IMCA must be consulted. Rethink Advocacy is the advocacy organisation contracted to provide this. Rethink Advocacy Service can be contacted on 01226 292621 and email advocacyreferralhub@rethink.org

Who makes a best interests decision?

The decision maker should be the person in a position to enact the decision.

A doctor will be the decision maker about a medical exam or treatment. A nurse will be the decision maker about a wound dressing. A social worker will decide on what care package to provide. If a decision is complex or controversial it is best practice for a group of professionals to make a collective decision.

However, if the person has a Lasting Power of Attorney (LPA) for Health and Welfare or Property and Affairs, best interests decisions should be made by the person with the relevant power of attorney. They are under the same duty as everyone else to act in the best interests of the person. If you suspect they are not adhering to best interests decision making they must be challenged and their LPA could be revoked. The same applies to any court appointed deputy. Click here to report concerns about an attorney, deputy or guardian to the Office of The Public Guardian.



Some decisions are so complex or disputed they need to be made by the Court of Protection.

Chapter 8 of the Mental Capacity Act Code of Practice specifies the circumstances when decisions MUST be referred to the court of protection.
ADD link



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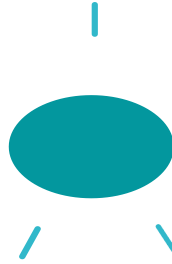
Best Interest Decision making: you MUST take account of ALL these factors

Find out the person's views, wishes, and feeling about the decision – just because they lack capacity, their views are still vital for establishing their best interests.

Consider whether the person might regain capacity and the decision could be delayed.

Identify all relevant information and circumstances that should be considered in the decision.

Avoid discrimination - don't make assumptions about someone's best interests based on the person's age, appearance, condition or behaviour. Do not make assumptions about the person's quality of life



What is the least restrictive intervention, which is still in their best interests.

If the decision concerns life-sustaining treatment the decision should not, in any way, be influenced by a desire to bring about the person's death.

Consult other relevant people - for their views about the person's best interests and to see if they have any information about the person's wishes and feelings, beliefs and values.

Further reading and more in-depth guidance



Making Decisions: a Guide For Advice Workers



7 Minute briefing on Executive Capacity – I need to change this one



The Mental Capacity Act Code of Practice is statutory guidance that **MUST** be followed in working with people who need support to make decisions.

In depth guidance from 39 Essex Chambers on carrying out and recording capacity assessments

For further information of advocacy Service

The General Medical Council's interactive decision-making tool for when you doubt someone's mental capacity to make a decision about medical care and treatment.



SCIE Good practice guidance on accessing the Court of Protection

Adapted from Hillingdon Safeguarding Adult Board : Mental Capacity: what practitioners need to know (2022)