

# 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.

## Contents:

- What is mental capacity to make a decision?
- Key finding from Safeguarding Adults Reviews
- The principles of the Mental Capacity Act 2005
- When to doubt mental capacity or set aside the "presumption of capacity"
- What to do when you doubt someone's capacity to make a decision
- Who should assess mental capacity?
- How to assess mental capacity
- Tricky issues and challenges: fluctuating capacity, and what is "executive capacity"
- Making decisions in someone's best interests
- Resources and further reading to support your practice.



## 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**.

# 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 2017-2019 shortfalls in the application of the Mental Capacity Act was an issue identified in 60% 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*".



**"A Matter of Life and Death: A Rapid Review of London's Safeguarding Adults Reviews" found that:**

*"many professionals do not undertake mental capacity assessments, cannot agree on the outcomes of assessments of decision-making capacity or do not keep adequate records of their assessments, or decision making."*



**"Learning from SARs: A report for the London Safeguarding Adults Board" (2017) found that:**

*"much of the learning in the SARs was about missing or poorly performed capacity assessment, insufficient scepticism and respectful challenge of decision making...and in some cases an absence of best interest decision making"*

and *"the majority of the evidence...points to fundamental flaws in how the Mental Capacity Act is understood and applied in practice"*.



## 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.**

**What sort of behaviour or circumstances cause doubt about someone's capacity?**

**In all these case examples there is reason to doubt capacity**

**Fred is signing ownership of his house over to a virtual stranger**

**Priti falls a lot but is refusing help from a physiotherapist**

**Eva refuses help with applying for benefits even though she has no money for food or rent.**

**Ade refuses to throw out any of his rubbish and it is piling up in his home.**

**Aziz misuses his insulin and is refusing help to check the dose and administer it**

**Sue is refusing nursing care despite worsening pressure sores**

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

# 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?

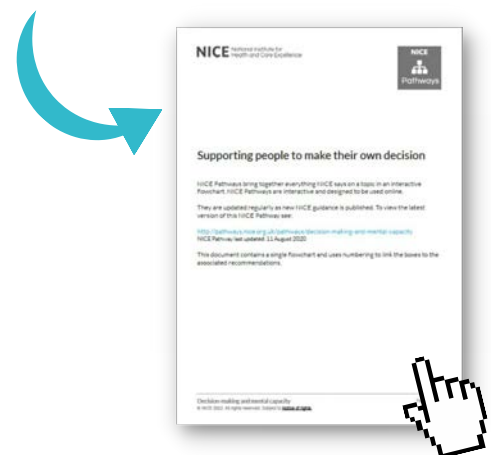


You may need to involve a **Speech and Language Therapist** or an **interpreter** in a different language or sign language.

**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.



**If you've taken steps to support someone to reach a decision for themselves and you still doubt their ability to understand, retain and weigh and use relevant information then a Mental Capacity Assessment is needed.**

**You mustn't assume that someone else will do this. Take responsibility for ensuring that an assessment takes place.**

# Who Should Assess Mental Capacity?

**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

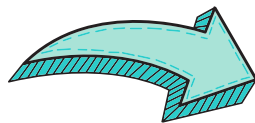
There are a **range of other decisions**, particularly those which have a significant impact on someone over time, which need **someone with more experience and relevant expertise** to assess mental capacity, such as a social worker.



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 doubt someone's capacity to make a decision about:

- safeguarding support
- housing/accommodation
- financial decisions
- care and support, such as help with personal care or meal preparation

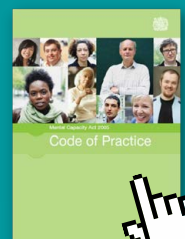


Please refer your concerns to  
**Adult Social Care** via  
[socialcaredirect@hillingdon.gov.uk](mailto:socialcaredirect@hillingdon.gov.uk) or  
01895 556633

## Best practice:

**When you make a referral**, please 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 of Practice** gives guidance on who should assess capacity in any given situation.





# 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 temporary or permanent.

#### Examples of impairments or disturbances of the mind or brain

Phobias	Anxiety	Personality Disorders
Learning Disability	Depression	Dementia
Alcohol related brain damage	Brain damage	Schizophrenia

### 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 of **relevant background information** too.

The determination of capacity must be made on the **balance of probabilities** - is it more likely than 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 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?

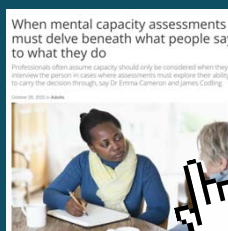
Sometimes a person can give **coherent reasonable answers to questions during assessment** that indicate they can understand, retain, and weigh and use relevant information in the abstract. However, **they may be unable to execute the decision in a real world situation. This can happen if their executive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

This **Community Care** article highlights the importance of **delving beneath the surface** when assessing capacity.



Enfield SAB have produced a **7 Minute briefing on Executive Capacity**





# 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. **Pohwer** are the advocacy organisation contracted to provide this.

## 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.



**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 taken into account in the decision.

**Avoid discrimination** - don't make assumptions about someone's best interests on the basis of the person's age, appearance, condition or behaviour.



**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. **Do not make assumptions about the person's quality of life.**

**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



## Enfield SAB's 7 Minute briefing on Executive Capacity



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



Pohwer Hillingdon  
IMCA leaflet

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

## Community Care articles about applying the Mental Capacity Act in practice

### When mental capacity assessments must delve beneath what people say to what they do

Professionals often assume capacity should only be considered when they interview the person in cases where assessments must explore their ability to carry the decision through, say Dr Emma Cameron and James Codling



### Hoarding and mental capacity: key points for social workers

Working with a person who hoards is likely to raise issues of whether they lack mental capacity to make particular decisions

by Ruth Hardy on March 12, 2016 in Adults



### Failure to conduct mental capacity assessment left man at risk of financial abuse, ombudsman says

Mrs Y complained the council failed to take appropriate action to concerns she raised about her father's health, welfare and finances

by Luke Rogers on July 5, 2019 in Adults

