

Why this topic?



[Analysis of Safeguarding Adult Reviews: April 2017 - March 2019 | Local Government Association](#)

A National Analysis of 231 Safeguarding Adult Reviews was published in December 2020. Safeguarding Adult Reviews (SARs) take place where an adult has died or been seriously harmed, and there has been abuse or neglect, in order to learn about practice improvements and working better together.

The National Analysis found that nearly all SARs identify a lack of use of the Mental Capacity Act (MCA) 2005 or it not being used properly, in particular: **capacity assessments**, best interests decisions, and (respectful) challenge of decisions. Concerns in the national analysis were about:

- failure to assess
- the assumption of capacity
- shortcomings in capacity assessment
- poor record-keeping
- staff lack understanding and confidence in applying the MCA
- the (non) involvement of the Court of Protection.

How the MCA supports the protection of staff

The MCA if used properly protects staff from civil liability for loss or damages and /or criminal prosecution, for instance for trespass, assault, battery, false imprisonment, and theft. Staff must take reasonable steps to establish if the person lacks capacity and must reasonably believe the person lacks capacity about the matter, and it is in their best interests for the action to be taken (MCA Section 5).

The MCA does not give any protection from the use of force or restraint unless it is proportionate to prevent harm, properly using the relevant sections of the MCA.

The five Mental Capacity Act 2005 Principles

The first three out of the five statutory principles written in the first section of the Mental Capacity Act support capacity assessment:

1 A person must be assumed to have capacity unless it is established that they lack capacity.

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

3 A person is not to be treated as unable to make a decision merely because they make an unwise decision.

The fourth and fifth principles come into play after a capacity assessment has found the person does not have capacity to make a particular decision, during the Best Interests decision making process:

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 his best interests.

5 Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Non-discrimination


The MCA supports non-discrimination and treating everyone equally.

“A person's capacity must not be judged simply on the basis of their age, appearance, condition, or an aspect of their behaviour”.

What is a capacity assessment?

A capacity conversation

- Assessing capacity is a conversation with the person to explore their decision-making about a specific matter when the decision needs to be made.
- Capacity is a legal definition not a medical one, and a capacity assessment is different to a clinical assessment.
- Thinking about capacity is not a clipboard 'test' or 'examination'.
- Don't just record what the person says they will do but also what they actually do, and over time, for example observe how they behave...
- Your conclusions, reasons and recording of the thinking are the determination about the person's capacity at that time to make that decision.

 Mr Justice Hayden said in the [judgement EWCOP 2021](#):

“It is not a test that an individual passes or fails, it is an evaluation of whether the presumption of capacity has been rebutted and if so, for what reason.” (Para 12)

Key practice points:

- **A person may lack capacity to make one decision while having capacity to make others.**
- **Do not carry out a single big assessment for several issues.** Each decision to be made, action to be taken, or consent to be given requires its own capacity assessment.
- But also step back before reaching a conclusion about decision-making capacity for each decision and ask yourself if they all make sense logically with each other - avoid silos.
- Start the capacity assessment process with the decision/action that the person appears to have difficulty doing, not with determining if there is a disturbance or impairment of the brain or mind.

- Clarify the specific decision to be made.
- **All practical steps to support the person to make the decision must be provided**, e.g. work with the person to help them understand the relevant information; consider if the issue needs to be broken down into smaller simpler decisions.
- If you find the person cannot make the decision/take action/give consent, only then move on to evaluate if it is because of an impairment or disturbance of the brain or mind.

Evidence is key

- Recording "it was felt P lacked capacity" is not good enough.
- The capacity assessment process must be based on evidence.
- Evidence may be built up over time with a series of visits, especially with someone who does not do what they say they understand to do.
- Observe, record, how does the person put it into practice, or not?


Making records of your conclusions 'what good looks like'

- As with all records made under public law, be aware your notes and the case records may become evidence, be used in Court, come under the lens of a Safeguarding Adult Review (SAR), or be used in a police investigation.
- Recording must be detailed, accurate, and more than a few bullet points.
- Notes made at the time are much better than later recollections.
- Record words spoken or behaviours observed, over time.
- Any opinion you state must be backed up by evidenced facts.
- Show how you understand and apply the MCA five principles.
- Yes / no answers are of little use.
- Include your reasons and rationale, the why and why not. 'Show your workings'.
- 'Has capacity' 'Lacks capacity' or 'Making unwise decision' must not be recorded in notes as statements on their own.
- Any previous note in a case file about capacity must not be relied on for a current judgement about a person's capacity (but may include relevant information to inform a Best Interests decision).
- If you do not make adequate records with all that should be there, detailing the capacity assessment process and then any best interests decision making process, you may not be protected by the MCA and may be acting illegally. You could be liable for damages or criminal prosecution for trespass, assault, fraud and theft, false imprisonment, or battery.
- [More on records and forms](#)

The Court highlighted what should be in a good assessment and best interests decision in a 2013 judgement which has only recently been published:

- evidence a clear rationale
- guard against imposing too high a test of capacity
- be aware of the importance of using tangible resources, like drawings and pictures, to assess and improve the person's level of understanding
- clearly articulate the information relevant to the decision
- use the [relevant information guidance from the Courts](#)

- also note that the “reasonably foreseeable consequences” [MCA s.3(4)] information will differ according to the decision.

 [\[2013\] EWHC 3230 \(Fam\)](#)

39 Essex Chambers guide on how to apply the principles in assessment and how to record your assessment:

 [Mental-Capacity-Guidance-Note-Capacity-Assessment-May-2021.pdf \(netdna-ssl.com\)](#)

When might you need to consider mental capacity?

In the safeguarding adults context

People who lack capacity to make some decisions are at more risk of abuse and neglect, as are all adults with disabilities and care and support needs. Be vigilant; have safeguarding on your radar.

- Does a person's behaviour put them at risk of harm or abuse?
- Is the person repeatedly making seemingly unwise decisions, such as refusal of care and treatment, self-neglecting, staying in an abusive situation?
- A person cannot consent to abuse.
- Self-neglect is not a life-style choice.
- A person may lack capacity to make decisions in a Section 42 enquiry and about taking action to reduce risk.

 [The A to Z of the Mental Capacity Act \(scie.org.uk\)](#)

C is for Causative Nexus

“Starting with what the person appears to have difficulty doing”

 [The A to Z of the Mental Capacity Act \(scie.org.uk\)](#)

V for Values – why do you think it's needed?

Other examples that might trigger an assessment...

- Someone appears to be unable to make the decision / give consent / carry out the action at the time it is needed to be made/given/taken...
- Think about at what point you consider capacity assessment when someone is in decline?
- If there are concerns that a person is not able to give informed consent, then you should assess capacity. If a person lacks capacity, they cannot consent even if they agree to or seek the care or treatment, or willingly sign the contract e.g. a tenancy agreement...
- Explore if a person cannot **demonstrate** what they say they will do [MCA Section 4.21 use and weigh].

NB:

- Assessments must be done when the person is at their best.
- Plan ahead with the person when they have capacity, for times when they do not.

Who carries out the assessment?

The Mental Capacity Act 2005 can be used by any service, and by people in any role: police, ambulance, family members, social worker, NHS staff, care staff, housing... it depends on what decision/consent/action is in consideration, and who is responsible, or who would be liable if the Act was not used.

A 2012 case and 2013 appeal found that the Act applies even if staff, in this case police, were not aware of it, but who knew or ought to have known the person had limited understanding.

 [39 Essex Chambers | Commissioner of Police for the Metropolis v ZH | 39 Essex Chambers | Barristers' Chambers](#)

What types of decisions can be made using the Act?

Capacity can be assessed for decisions covering all aspects of life:

- consent to care and medical treatment, including Covid-19 vaccinations
- planning care and treatment e.g. Emergency Health Care Plan (EHCP)
- choosing accommodation, where someone lives
- financial including contractual capacity to agree or give up a tenancy
- authorising a deprivation of liberty
- who someone is in contact with
- capacity to consent to and engage in sexual relations
- capacity to consent to marriage or civil partnership
- use of social media
- informal decisions made with family or care workers: help to decide which clothes to wear, what to eat, shopping to buy
- Any disputes that cannot be resolved must go to the Court of Protection, in a timely way. A dispute includes when the person, their partner, family members, Attorney or Deputy or friends, or other professionals disagree with the assessment of capacity or proposed Best Interests decision.

Decisions that cannot be made under the Act

Some decisions can never be made for someone else using the Mental Capacity Act:

- Family and relationship decisions: consent to marriage or civil partnership, give up child for adoption, divorce
- Consent to a sexual relationship
- Voting.

But the Court of Protection can assess a person's capacity to take these decisions and make orders on protective measures if it finds a person does not have capacity, e.g. to consent to or engage in sexual relations.

Records and Forms:

- Important significant capacity assessments (and any following Best Interests decisions) should follow the formal MCA process and **must** be recorded properly under the Act and Code of Practice.

- Assessments of informal day to day decisions do not have to be recorded (although staff will make records in line with their organisation's methods e.g. a care plan or daily notes).
- Family members do not have to use the Code of Practice and make records (although it is helpful if they do in case of future dispute).
- If you are re-assessing someone's capacity and change your reasonable belief about their capacity from previously – make it clear why.
- Some examples of forms that could be used to record your assessment:
 - [Layout 1 \(scie.org.uk\)](#) (you need to register a SCIE account)
 - [Microsoft Word - Capacity Assessment Template \(scie.org.uk\)](#)
 - [file \(southendccg.nhs.uk\)](#)
 - [Mental-capacity-assessment-v2.pdf \(norfolksafeguardingadultsboard.info\)](#)
 - Court of Protection Form COP3 [Form COP3: Make a report on someone's capacity to make decisions - GOV.UK \(www.gov.uk\)](#)

How to complete a Capacity Assessment?

The Mental Capacity Act Section 2 says that:

“a person lacks capacity in relation to a matter if **at the material time** he is unable to make a decision for himself in relation to the matter **because of** an impairment of, or a disturbance in the functioning of, the mind or the brain.” [Our emphasis]

Clarify the decision/consent/action to be considered

- Plan and prepare for the assessment.
- Do not carry out a single big assessment for several issues. Each decision to be made, action to be taken, or consent to be given requires its own capacity assessment.
- “No one should start a capacity assessment without being clear about the decision that needs to be made” and the relevant information.
- “Sometimes, decisions need to be broken down; there may be more than one decision to make at any one time.
- Don't make it too difficult for someone to be a part of that decision by making it too complex or difficult to understand.
- Make sure to look at the final decisions together as a complete picture and ensure the outcomes of those decisions work together.”

 [The A to Z of the Mental Capacity Act \(scie.org.uk\)](#)

Relevant information

- The Courts have given indications of information that is potentially relevant to a decision and the reasonably foreseeable consequences, and what is not relevant, that is, what the person must be able to understand, use and weigh to be able to make the decision.
- 39 Essex Chambers have produced a guidance note, updated May 2021

 [Mental-Capacity-Guidance-Note-Relevant-Information-for-Different-Categories-of-Decision-1.pdf \(netdna-ssl.com\)](#)

- Court judgement setting out how to apply the Act to assessment and recording – written about an expert's role, but relevant to all professionals.

<https://www.baillii.org/ew/cases/EWCOP/2020/58.html>

Capacity conversation questions

To be able to evaluate if a person lacks capacity to make a decision or take action when it needs to be made, there are three questions to ask, **in this order**, within the capacity conversation.

[This order, as made clear by the Court of Appeal, changed what was known as the 'two-stage test'. It also helps you with the support principle; if you can help them overcome that difficulty, they have capacity to make the decision, and you don't need go to further.]

1

Is the person **able to make the decision** / give consent / carry out the action – with all **practicable support** that they require given?

Is the person able to make the decision?

SCIE A-Z - P is for Practicable steps

If yes, they can, the process stops.

If no, ask:

2

Is there an impairment or disturbance of the brain or the way the mind works?

What is a brain or mind impairment?

If no – look for other reasons e.g. is inability due to coercion and control? Undue influence or fear? And what can be done to protect their human rights and mitigate risk?

If yes, ask

3

Is the inability to make the decision at the time it needs to be made **because of** the brain or mind impairment or disturbance?

Because of is sometimes referred to as the causative nexus/causal link

If yes – they lack capacity under the Mental Capacity Act 2005 to make that decision at that time.

Is the person unable to make the decision?

Decisional capacity/functioning – ability to make the decision

- You decide to assess a person's ability to make the decision / give consent because it seems the person might not be able to.
- MCA Section 3 sets out the questions to assess whether an individual is unable to make a particular decision at a specific time.
- The standard of proof to be used to decide a question of capacity is a balance of probabilities, i.e. your reasonable belief and your evidence show it is more likely than not. This is lower than beyond reasonable doubt as in the criminal standard. (MCA Section 2)

Within a conversation, ask in this order, can the person *with all help possible*:

- **Understand (take in, grasp the concept) the information relevant to the decision?**
- **Retain it (just long enough to make the decision)?**
- **Use or weigh that information as part of the process of decision making?**
- **Communicate their decision?**

If the answer is **no** to any one question, the person is unable to make that particular decision at that time.

Can talk the talk but not walk the walk?

- Executive capacity or executive dysfunction is the ability to **use and weigh matters**, to put their understanding into practice, or not.
- It is the crux of decision making and is a separate concept to 'understand' the information.
 - Does the person apply the information they appear to understand?
 - Has the person had many capacity assessments in the past?
 - If they function well in clinical settings – what are they like in a community setting, e.g. a café, can they keep to the point or does their concentration and focus wander off...
 - Is there a delusion, misperception of reality, severe phobia or fear such that they cannot act on understanding, a compulsive disorder, or a hidden disability?
 - A person may have a lack of insight – they say they understand to do one thing but does another or does not do it.

Esther agrees with the GP that she will take the medication as prescribed and that she knows it will make her better, and says that she does when asked by her family, but she never actually takes it...

What is impairment or disturbance of the brain or the way the mind works?


A disturbance of the functioning of the mind or brain, which makes someone unable to make a decision could be due to:

- a stroke or brain injury
- dementia
- a learning disability
- confusion, drowsiness or unconsciousness because of an illness, medication or treatment
- a mental health problem
- being under the influence of alcohol or drugs
- trauma, PTSD, flash backs - re-living and reacting to past events
- compulsion, severe phobia, delusion.

You need to have reasonable evidence of a disturbance of the mind or brain, but it does not have to be a formal psychiatric diagnosis (except for in the Deprivation of Liberty Safeguards (DoLS) and authorisation process).

Hidden disability

- **Executive dysfunction** is a term for the range of cognitive, emotional, and behavioural difficulties which often occur after injury to the frontal lobes of the brain.

 [Executive dysfunction | Headway.org.uk](https://www.headway.org.uk)

- Hidden disability can include Acquired Brain Injury such as frontal lobe damage/paradox or the 'knowing doing dissociation'. It can mean that a person's verbal skills and reasoning may still be good, which can **mask the extent of a cognitive impairment**.
- A person's stated verbal intent may not translate into action, potentially leading to self-neglect.
- NICE guidance recognises the need for 'real-world observation' in some circumstances of the person's functioning and decision-making ability in order to achieve a full picture of an individual's capacity.

 [NICE.org.uk - Decision making and mental capacity](https://www.nice.org.uk/guidance/CG176)

Learning from SARs: Lee Irving was murdered by his 'friends'. Lee scored better on verbal tests; but had an undiagnosed severe learning disability, with his IQ eventually assessed as 56 (in the lowest 1% of the population). [Newcastle SAR, 2017](#)

All practicable steps

- No one should be deemed to lack capacity to make a specific decision unless all 'practicable steps' have been taken to support them to make the decision.
- 'Practicable steps' might involve referring to support services such as advocacy, interpreters, Speech and Language Therapy, and learning disability nursing - to work with the person to help them understand the relevant information.
- All support means being where the person is at ease, fully meeting their communication needs.

 [The A to Z of the Mental Capacity Act - P is for Practicable Steps](#)

- Tri.x Mental Capacity Act 2005 Resource and Practice Toolkit is about capacity assessment and has helpful guidance to support you to think creatively about some of the steps that it may be practicable to take when deciding if a person is able to make their own decision. Includes a financial assessment toolkit in 'Amy's' story. Updated in 2020

 [Tri.x Procedures online - Practice examples and resources for complex and major decisions](#)

And why? It's 'because of'



Because of is often referred to as the causative nexus or causal link

It means someone cannot make a decision **because of** impairment etc.

And not just maybe, or partially caused by, but as a direct consequence of

NB: Being unable to make a decision is not the same as putting off a difficult dilemma or being indecisive!

And where?



- Does the person function well in clinical settings which are structured and where they are more looked after?
- Is someone very used to many assessments?



- What are they like in a community setting, e.g. a café? can they keep to the point or does their concentration and focus wander off...



- In a clinical setting, are they saying what you want to hear?



- Can they put the decision / action into practice in their home environment... on their own...?

Using the principles in practice

Assumed to have capacity

- **Capacity is a legal definition, not a medical definition**
- 'assumed to have' is the equivalent to 'innocent until proven guilty' in the criminal justice system.
- It means that you, who want the decision to be made or consent given but are concerned someone seems unable to, have to prove the person has a lack of capacity to make it, due to a disturbance or impairment of their brain or mind.
- The person themselves does not have to prove anything about capacity.
- That a person must be assumed to have capacity is a starting point, not the end.
- A capacity assessment is not neutral and might be intrusive, so you do need grounds to think it is needed.
- Remember: capacity is about what a person **does** as well as what they say.
- Don't take refusal of treatment or care at face value, especially more serious the risk...you must not justify poor care, institutional neglect, or services being inaccessible to the person with 'assumed has capacity' nor avoid responsibility when faced with complex high risk and difficult situations, such as with severe self-neglect.

Person 'lacks capacity' or 'has capacity' is not a blanket term

- A capacity assessment is always about a specific decision or action that needs to be made or taken at the time it needs to be made.
- The assessment is only in relation to that decision or action; and a person may have capacity to make one decision, but not another.
- **Lack of capacity is not an ongoing diagnosis.**
- Remember: you must not decide and/or record that a person lacks capacity without a capacity assessment, gathering evidence.

- Do not record that a person *has* capacity when there was a doubt or concern without recording why and what has led you to that view, in detail. You must also clarify what the decision or action and risk is that you were considering and what was done to help the person understand the risks and choices available. Record what has been done to reduce the risk.

Unwise decisions

- The principle does not say 'everyone has a right to make unwise decisions' regardless...
- The principle means do not judge capacity based *solely* on the unwise decision but consider all steps of the decision making, including *use and weigh*.
- It does not mean that you accept a refusal to engage / open the door / have wounds treated / accept personal care and do nothing or walk away. Uphold the right to life.
- Remember: use professional curiosity, ask "why?" Is the unwise decision based on:
 - Lack of understanding of the risks, or an inability to weigh information and consequences? Or
 - A difference in values, beliefs, and priorities?
- Can you walk with them?
- Seek legal advice. Do you need to go to the Court of Protection?
- If you find the person does have capacity to make the seemingly harmful or unwise decision also record what you have done to reduce harm from the consequences of their unwise decision.

An opportunity missed:

- No mental capacity assessment was undertaken prior to Mr B's discharge from hospital in December 2017, despite an assessment undertaken only a few weeks earlier having found that he lacked capacity at the point of admission.



[Leeds SAR, Mr B, 2020](#)

- Lack of understanding may include if someone is delusional. Mr A died after refusing treatment over six months; he was fixed on the belief that he only required treatment from a certain (unavailable) hospital. Although there was a deprivation of liberty authorisation, there were missed opportunities for capacity assessments, no best interests intervention about daily care and treatment, no evidence that anyone sought legal advice, and no consideration given to going to the Court of Protection.



[Adult A SAR – published October 2017 - East Sussex SAB](#)

Summary of MCA terms often used


- **Decisional capacity** – ability to make the decision.
- **Executive capacity/functioning** or **executive dysfunction** – ability to use and weigh, put the decision or action into practice, or not.
- **Diagnostic test** – that there is an impairment of, or disturbance in the functioning of, the mind or brain.
- **Causative nexus/causal link** – that the inability to make a decision is **because of** the brain or mind impairment or disturbance.

- **Functional test** – the four-stage test of decision making, as set out in the Act.
- **Capacity conversation** (aka previously as the 2-stage test):
 1. Is the person unable to make and put into practice the decision at the time it's needed?
If yes,
 2. Do they have impairment of brain of mind? If yes,
 3. Are they unable to make decision and put into practice because of the impairment or disturbance? If yes = person lacks capacity to make that decision at that time.
- **Reasonable belief and your reasons and evidence** - proof required to decide question of capacity.
- **Balance of probabilities** – more likely than not, proof used by Court of Protection.
- **Acid test** – is it a deprivation of liberty?

Legislative links

 [The Mental Capacity Act 2005](#)

 [MCA Statutory Code of Practice](#) Staff working with or caring for adults who lack capacity to make decisions for themselves have a legal duty to consider the MCA Code of Practice.

 [The Mental Capacity Act \(2005\) \(MCA\) and deprivation of liberty safeguards \(DoLS\) during the coronavirus \(COVID-19\) pandemic](#) The government Covid guidance and additional guidance was withdrawn on 10 August 2021. The Coronavirus Act 2020 and the Health Protection (Coronavirus, Restrictions) (Self-isolation) Regulations 2020 may be relevant – see the government statement (accessed online 11.08.21).

The Mental Capacity Act and safeguarding adults, what good looks like. Practice guides in this series


1. What is capacity, the MCA, who uses it? The Court of Protection
2. Capacity assessment process (this one)
3. Challenges in capacity assessment e.g. fluctuating capacity, reluctance to engage
4. Preferred communication (for all practicable support)
5. Top tips, with a working example of safeguarding when capacity is a feature
6. Assessment form sample and expected standards
7. Next of kin, Living Wills
8. Attorneys, deputies, and the role of the Office of the Public Guardian
9. Best Interests decision making process

More MCA resources

 [39 Essex Chambers Guidance Note Capacity Assessment, updated May 2021](#)

 [MCA: Assessing capacity | SCIE](#) Social Care Institute for Excellence

 [Assess Right – the MCA Easy Read document](#)

 [DSAP MCA and Safeguarding Adults training and briefings e.g. on self-neglect](#)