



**Durham  
Safeguarding Adults  
Partnership**



## **The Mental Capacity Act and safeguarding adults: what good looks like. Assessment Form and Expected Standards**



**All about the  
Mental  
Capacity Act  
2005 and  
safeguarding  
adults in a  
bitesize series:  
more soon.**

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there.**

## Why this topic?

The Mental Capacity Act 2005 and the Code of Practice set out matters to consider including fundamental principles, ability to make decisions, lack of capacity, and Best Interests decision making processes, and set out when staff are protected under the Mental Capacity Act (MCA).

 [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.

If you do not make adequate records, detailing why you doubt capacity, the capacity assessment, and then any best interests decision making process, along with what supports your reasonable belief, evidence and rationale, you may not be protected by the MCA section 5 and may be acting illegally. You could be liable for damages or criminal prosecution for trespass, assault, fraud and theft, false imprisonment, or battery.

As with all records made under public law, your notes and the case records may become evidence, be used in Court, or be used in a police investigation. Recording must be detailed, accurate, completed as soon as possible or at the same time, and more than a few words.



**“It is hard to overemphasise the importance of accurate, thorough and contemporaneous recording to agencies being able to give clear and defensible accounts of their decision-making both within and between agencies.”**

Leeds SAR

Judges in Court of Protection cases have quite often criticised the standard of capacity assessments, evidence, and record keeping, along with the lack of timeliness in taking a case to Court; criticisms which may name the professional and the organisation as part of the published judgement.



**“record of an assessment of capacity [D4] is less obviously such a thing. It appears to be just a computer records entry, as opposed to a specifically designed form for recording capacity assessment. The top line reads 'Assessment of capacity on 09/02/2022' but the first heading is 'SPECIALIST REVIEW'. The process was conducted by...”**



**“This issue should have been referred to the Court much more promptly and by one or both of the health bodies.”**



[S v Birmingham Women's And Children's NHS Trust \[2022\] EWCOP 10 \(07 March 2022\) \(bailii.org\)](#)

## Making records

There is a difference for recording important decisions and everyday decisions.

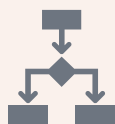
- Family members do not need to record capacity conversations (assessments) and Best Interests decisions for informal day to day decisions although it may be helpful to in case of future disagreements.

- For staff, day to day informal decisions, about what someone wears, eats, activities, or personal hygiene, may not need capacity conversations and Best Interests decisions to be recorded, although they should be set out in the care plan. Organisations should have their own policies and procedures to be followed to protect both staff and clients.
- If situations develop where those day-to-day decisions become a dispute – the person refuses social care, being washed, eating, drinking, resulting in self neglect and harm – keep records, seek advice, report concerns.
- Disputes, including with the adult concerned, over capacity assessment and Best Interests decisions for formal decisions, and/or where there is risk of harm or actual harm, are those that most likely should go to the Court of Protection if they cannot be resolved.
- Major decisions always need formal records made by professionals.

Your record should make clear:

- the fundamental principles of the MCA 2005 have been followed;
- that proper steps have been taken to support the person's decision-making and participation in the assessment;
- the conclusions reached are adequately explained.

It is easier for others to understand a professional's rationale for decision making, and indeed for the professional to record the rationale and the evidence gathered, if the structure of documentation and forms that are available for staff to use support such recording by default.



While tools, checklists and forms are not substitutes for careful observation, good conversations, thoughtful consideration, and using your professional judgement, they can be useful prompts and suggest where to go next.

## A capacity conversation



**“For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time she is unable to make a decision for herself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.”**

Mental Capacity Act Section 2



**“The process of undertaking an assessment of capacity is different to the record of such assessment.”**

### Assessment form sample and expected standards

Ensure that the basic info is accurate and up to date: who was there, date, start and finish time, venue, first/second conversation...

Writing what the person actually says using their own words is always better than summarising it in your words. If they are non-verbal describe their actions and behaviour, what they did, not what you think it means. Attach the account as an appendix if there is no room on the form.



## **'Lacks capacity' or 'has capacity, unwise decision' must not be recorded as stand-alone statements**

If you are completing a form which asks if the person has capacity and provides for a yes / no answer, consider, 'capacity for what and when?' And add 'capacity for what and when' that you are answering about in the form's notes.

While the starting point is assuming that a person aged 16 and over has capacity (MCA Section 1), when you have proper reason for concerns about capacity, a capacity assessment is needed, especially if it is in relation to safeguarding concerns or harm.

- The assessment is only in relation to a specific decision or action; a person may have capacity to make one decision, but not another.
- Clarify what the decision or action or risk is that you were considering. 'Does Sarah have the capacity to decide where to live on discharge from hospital?'
- Record your evidence that supports your doubt about the person's capacity to make the decision or for example understand the import of words they say.' John called the care worker a xxxxx [sexual abuser]; we think he may have heard the word from xxx'
- Record the person's understanding of the capacity assessment conversation and its purpose. 'Jess was able to tell me that she knows that we are worried about her smoking in bed and that I want to know what she understands about the risk and what happens in a fire'.
- Set out the relevant information to the decision ([See Relevant information - page 10](#)) given to the person.
- If there is more than one matter or decision, record separately as they are different capacity assessments.
- Record what practicable steps you have undertaken to support the person to understand the choices available, and risks that you are concerned about, and longer-term implications, to retain the information, use or weigh, to make the decision (see guide Preferred communication and all practicable steps) including the impact and nuance of cultural differences.
- Where several assessments take place over time, for example about financial capacity to manage ongoing affairs, or capacity to manage an ongoing health condition such as diabetes, record what was different and any significance of variation in responses during different visits.
- Consider if you need others involved – a joint assessment?
- Record your conclusion, that they have capacity or that they lack capacity for that decision at that time along with why you have come to that conclusion.
- If you find that a person has capacity, for example to continue with risky behaviour, drinking alcohol, or refusing care or medical assessment, when there was a doubt or concern about their capacity, record in detail why and what has led you to the view that they do have capacity to continue taking that risk. Record what you have done to reduce harm from the consequences of their decision.
- If you find a person does have capacity but that their decision making is impaired for examples due to duress, coercion, or undue influence record why and what you have done to address it / mitigate risk or harm. Care Act 2014 Section 42 adult safeguarding may apply.



In [S v Birmingham Women's And Children's NHS Trust \[2022\] EWCOP 10 - Court of Protection Hub](#) Judge Hilder referred to an “unsatisfactory approach” and said:



“There is nothing in the written records which clearly identifies the [relevant] information which (her) treating clinicians considered to be relevant to the process of (her) deciding whether to have an abortion.”

“the assessing clinicians...consider that she fails the statutory test for capacity only because she is unable to 'use and weigh' it. I have not been able to identify from the evidence any information of a type which I have identified as relevant to the decision which S is said to be unable to use or weigh.”

Judge Hilder

### Reluctance to engage

If the person will not engage with the capacity assessment or best interests decision making, record what else was done to support them to engage and what alternative strategies were used, perhaps who else was involved, or what support offered to promote the person’s capacity and support them in decision making.

### Evidence

Your evidence must rebut the presumption of capacity.



Record your reasoning. In considering expert evidence on capacity, Lord Prosser in *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548, 604 said “what carries weight is the reasoning, not the conclusion.”



It is important that the evidence of lack of capacity shows **how** this prevents the person concerned from being able to take decision(s). That is, how do you know that the person cannot make the decision because of impairment of, or a disturbance in the functioning of, the mind or brain?



Establish and record what ‘impairment of, or disturbance in the functioning of, the mind or brain’ the person has, and what impact it has.



‘Because of’ in the Act means solely caused by, not influenced by or one of several contributory factors.

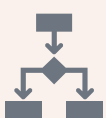


“Even if aspects of her weighing are influenced by symptoms of her diagnosed condition, I am not satisfied that (she) is unable to use or weigh the information relevant to making a decision about termination of her pregnancy. Rather, in my judgment she is demonstrating the application of her own values to the decision in question.”

Judge Hilder,



[S v Birmingham Women's And Children's NHS Trust \[2022\] EWCOP 10 \(07 March 2022\) \(bailii.org\)](#)



Court judgement in 2020 setting out how to apply the Act to assessment and recording evidence – written about an expert’s role, but relevant to all professionals.

“What concerned the parties was the process leading to that the conclusion and the lack of clear explanation as to how it had been reached.”



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

# Rationale to support each of the four aspects of making the decision

Under the Mental Capacity Act 2005 Section 3, a person is regarded as being unable to make a decision if they are unable to carry out any one of the following:

- **understand** the information relevant to the decision,
- **retain** that information,
- **use** or weigh that information as part of the process of making the decision, or
- **communicate** their decision (whether by talking, using sign language or any other means).

The first three should be applied together. If a person cannot do any of these three things, they will be treated as unable to make the decision. The fourth only applies in situations where people cannot communicate their decision in any way. MCA Code of Practice, para. 4.15

Using quotes from Court judgements as examples, the four aspects of making a decision are illustrated below with statements of ability and inability to make the decision. They demonstrate the level of detail that should be recorded in your capacity assessment.

## 1 MCA decision making: Understand

**Rationale:** To grasp information or concepts.

**Description/definition:** The person is unable to grasp, on a purely intellectual level, concepts (their nature or meaning) or information (e.g. volume, detail, complexity) relevant to the decision.

**Inability:** “[P] has barely an inkling of the health risks involved. She was unable to link sex to pregnancy. Indeed she had virtually no idea how her babies came to be in her tummy (as she put it).”

**Intact ability:** “He understands that the relationship is exclusive, and in broad terms that marriage includes society, support and assistance, and the concept of sharing a common home and domestic life, and that two people come together and owe each other rights and responsibilities.”

## 2 MCA decision making: Retain

**Rationale:** To remember (long enough to make the decision)

**Description/definition:** The person is unable to remember facts or events that are needed to make the decision.

**Inability:** “He had no memory of making the two LPAs.”

**Intact ability:** “It was also clear to me that he had retained information given to him at various stages about these matters, including information imparted during the sex education sessions he has attended.”

## 3 MCA decision making: Use or weigh

**Rationale:** To imagine or abstract

**Description/definition:** The person is unable to imagine or abstract and therefore has difficulty considering relevant factors, including options, which are not concretely present or familiar.

**Inability:** “She struggles with abstract thought such as picturing herself in a different setting.”

**Intact ability:** “He understands that there is a choice between home or an institution and living with his family and he prefers the latter.”

### 3 MCA decision making: Use or weigh

**Rationale:** To appreciate, delusions or confabulations

**Description/definition:** The person is unable to apply information (including consequences of the decision) to oneself due to delusions or confabulations.

**Inability:** “[P] believes that the tumour was placed in her body by ‘screen things’ with the aim of influencing the doctors into stating that the operation was needed.”

**Intact ability:** “The view that [P] wishes to put forward is that she does not want the case to continue, and she would prefer to stay where she is... I do not think her view is unreasonable or driven by delusion.”

### 3 MCA decision making: Use or weigh

**Rationale:** To appreciate, insight into condition or care needs

**Description/definition:** The person is unable to apply information (including consequences of the decision) to oneself due to lack of insight into one’s condition or associated care needs.

**Inability:** “[P] denies that she suffers from schizophrenia, that she needs to take medication to remain well and avoid consequent relapse of her illness and renal failure. As a result she does not understand the need for supported accommodation.”

**Intact ability:** “She demonstrated an understanding of and insight into her care needs and the reality of life if she returned home. She clearly understands that she is in need of total support and would need carers to visit four times a day. Although she said she could dress herself ‘if I had to’, I did not interpret this as indicating a significantly exaggerated or distorted view of her capabilities. On the contrary, I found her to be broadly realistic as to her physical limitations.”

### 3 MCA decision making: Use or weigh

**Rationale:** To appreciate, general

**Description/definition:** The person is unable to generally apply information (including consequences of the decision) to oneself.

**Inability:** “The point is that despite the overwhelming evidence to the contrary, [P] does not begin to appreciate that [Q] will not, under any circumstances, look after him.”

**Intact ability:** “She denied inappropriate use of social media (‘I have kept away from social media ... I don’t want to go back to square one’), showing an understanding that people contacting her through social media ‘might be a risk to me’.”

### 3 MCA decision making: Use or weigh

**Rationale:** To value or care

**Description/definition:** The person is unable to care about or value issues relevant to the decision hence unable to seriously consider certain options. This could relate to generalised apathy, or a strong attachment, fear or other emotion which overwhelms ability to value relevant information.

**Inability:** “The compulsion to prevent calories entering her system has become the card that trumps all others.”

**Intact ability:** “[P] [is] acknowledging her prognosis and choosing to give it no weight as against other information within the context of her own values and outlook when making a decision.”

### 3 MCA decision making: Use or weigh

**Rationale:** To think through the decision non-impulsively

**Description/definition:** The person is unable to think through the decision and proceeds to make the decision impulsively or to act in impulsive manner.

**Inability quote:** “The frontal lobe damage...means that a person such as [P] works on impulse. If the frontal lobe is disengaged from the decision-making process the decision is not thought out.”

[No intact ability example quote]

### 3 MCA decision making: Use or weigh

**Rationale:** To reason: flexible thinking

**Description/definition:** The person is unable to carry out basic mechanics of reasoning, specifically to employ flexibility of thought in responding to contrary evidence or concerns.

**Inability:** “If [P] developed a fixed idea about a subject, it was very difficult for her to incorporate counterbalancing or conflicting information.”

**Intact ability:** “[It is] not the case that [P] has undertaken the decision-making exercise in relation to dialysis solely on the basis of a concrete or ‘black and white’ view taken in respect of her prognosis but rather on the basis of placing in the balance many factors relevant to the decision.”

### 3 MCA decision making: Use or weigh

**Rationale:** To reason: balancing pros and cons

**Description/definition:** The person is unable to carry out basic mechanics of reasoning, specifically to compare pros/cons, advantages/ disadvantages, or benefits/risks of the decision.

**Inability:** “She cannot at the moment weigh the evidence up, identifying the pros and cons of a particular course of treatment, or really think about it at all. He said that when confronted with the balancing exercise she simply becomes both distressed and disengaged.”

**Intact ability:** “[P] gave [Dr X] a clear indication that she could weigh up the positives and negatives of whether or not to engage in sexual behaviour.”



### 3 MCA decision making: Use or weigh

**Rationale:** To reason: general

**Description/definition:** The person is unable to generally carry out basic mechanics of reasoning.

**Inability:** “She acknowledged receiving letters from [Q]. But she became significantly distressed, thought-disordered and preoccupied when invited to consider whether she might wish to respond to those letters.”

**Intact ability:** “After consideration, he suggested two solutions which may not be implementable but are reasonable alternatives to consider. In so doing, he demonstrates an ability to think systematically, and problem solve.”

### 3 MCA decision making: Use or weigh

**Rationale:** To give coherent reasons

**Description/definition:** The person is unable to give any reasons for their choice or only able to give reasons which are internally contradictory.

**Inability:** “He was not able to give coherent reasons for wishing to live where he is.”

**Intact ability:** “She is nevertheless able to describe, and genuinely holds, a range of rational reasons for her decision. When I say rational, I do not necessarily say they are good reasons, nor do I indicate whether I agree with her decision.”

### 4 MCA decision making: Communicate


**Rationale:** To express a stable or consistent preference.


**Description/definition:** The person expresses different or contradictory preferences at different times such that it is difficult to ascertain or to carry out the choice.

**Inability:** “[P]’s more recent views about sterilisation have [not] shown any greater reliability, oscillating between being vehemently opposed to it, to requesting it immediately (and being distressed when this could not be arranged), before reverting to opposition.”

**Intact ability:** “[P] understands her preferences clearly and has maintained her position consistently over the three conversations she has had with him, namely that she is prepared to continue to live where she is now.”

Adapted from the research paper

 [Broad concepts and messy realities: optimising the application of mental capacity criteria pdf \(bmj.com\)](https://www.bmj.com/content/367/bmj.m1167)

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## Relevant information

The Mental Capacity Act Section 3 (4) says:



“The information relevant to a decision includes information about the reasonably foreseeable consequences of

**deciding one way or another**

**OR**

**failing to make the decision**

The relevant information to the decision under consideration, given to the person, should be recorded in the capacity assessment.

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 or 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 \(netdna-ssl.com\)](https://www.netdna-ssl.com/pdf/Mental-Capacity-Guidance-Note-Relevant-Information-for-Different-Categories-of-Decision-1.pdf)

## Living Wills

Ensure your records detail your understanding of any Living Will (Advance Decision to Refuse Treatment) and the impact on your practice – for example not making a Best Interests decision and not providing treatment you judge clinically indicated due to a Living Will.



**See the Next of Kin, Living Wills guide in this series**

## Recording Best Interests decision making

The principles for recording capacity conversations as above also apply.

- Your judgement about what is in the person’s Best Interests for example over medical treatment, must be detailed enough for someone one else to understand; not merely “wife consents”.
- Best Interests meetings should be recorded in full with clear actions identified and timely review set.
- It must be clear who the responsible decision maker is, and who is giving information or advice that is taken into account in the Best Interests decision.
- Record any areas of disagreement; disputes that cannot be resolved must go to the Court of Protection.

## Deprivation of liberty assessments and Best Interests standards

ADASS has produced guidance to the deprivation of liberty forms with examples for managing authorities, supervisory bodies, and for the two or more assessors of the six deprivation of liberty assessments.

One example includes weighing up the benefits and burdens (pros and cons) of different options where a person was objecting to being in a care home, recorded in consideration of Best interests. See page 11

 [The Mental Capacity Act Deprivation of Liberty Safeguards pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

## Resources

39 Essex Chambers guidance note on capacity assessment includes how to record your assessment

 [39 Essex Chambers | Mental Capacity Guidance Note: Assessment and Recording of Capacity - 39 Essex Chambers | Barristers' Chambers](#)

Court of Protection handbook

 [Expert evidence – Court of Protection Handbook](#)

Office of Public Guardian terminology

“Tackling our terminology” on the Office of the Public Guardian blog is a list of OPG words and phrases Read the new post:

 <https://publicguardian.blog.gov.uk/2022/02/24/tackling-our-terminology/>

Durham Safeguarding Adults Partnership has written a guide to provide information about what a good capacity assessment looks like, and what to consider about a person’s capacity. It includes useful advice for a good assessment.

 [Mental Capacity Act 2005 What good looks like - capacity assessment.pdf](#)

Mental Capacity Tool to help in making clinical decisions with case studies and resources


 <https://www.gmc-uk.org/ethical-guidance/learning-materials/mental-capacity-tool>

## Forms

The Government has produced forms to complete for applying to the Court of Protection which could be useful to adopt for use in general circumstances, E.g.

Form COP3 (an 'assessment of capacity') to submit an expert opinion about someone's mental capacity as part of an application to make decisions for them.


Forms COP1A / COP1B applying to Court to make Best Interests decisions on someone’s behalf

 [Court of Protection forms and guidance - GOV.UK \(www.gov.uk\)](#)

The [BMA/RCP proforma pdf](#) for documenting best interests decisions about Clinically Assisted Nutrition and Hydration (CANH) has space to highlight any areas of disagreement that the court would need to address, which could be useful practice to adopt.

 <https://www.bma.org.uk/advice-and-support/ethics/adults-who-lack-capacity/clinically-assisted-nutrition-and-hydration>


NB If the draft single Code of Practice as currently being consulted upon is agreed, many capacity assessment forms setting out the sequence of questions (the two-stage test) will require amending.

 [Changes to the MCA Code of Practice and implementation of the LPS - GOV.UK \(www.gov.uk\)](#)

Tim Spencer-Lane from 39 Essex Chambers has written a guide to the draft Code of Practice; key changes include updated guidance on the capacity test, fluctuating capacity and best interests decision making.

 [Guide to the draft MCA code of practice - Community Care](#)

Tim Spencer-Lane has also written a summary on the way the government plans to implement the Liberty Protection Standards.

 [How the government plans to implement the Liberty Protection Safeguards - Community Care](#)



### 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**
- 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 (this one)**
- 7. Next of Kin, Living Wills, Attorneys, and the role of the Office of the Public Guardian**
- 8. Best Interests decision making process**