



WOKINGHAM BOROUGH COUNCIL

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The **Mental Capacity Act 2005** has been in force since 2007 and applies to England and Wales. The primary purpose of the MCA is to promote and safeguard decision-making within a legal framework.

It does this in two ways:

- ✚ By empowering people to make decisions for themselves wherever possible.
- ✚ By protecting people who lack capacity by providing a flexible framework that places individuals at the heart of the decision-making process.

The Act sets out how capacity should be assessed and procedures for making decisions on behalf of people who lack mental capacity.

“The underlying philosophy of the MCA is that any decision made, or action taken, on behalf of someone who lacks the capacity to make the decision or act for themselves must be made in their best interests.”

MENTAL CAPACITY ACT KEY POINTS



The Mental Capacity Act (MCA) 2005 applies to everyone involved in the care, treatment and support of people aged 16 and over living in England and Wales who are unable to make all or some decisions for themselves.



The MCA is designed to protect and restore power to those vulnerable people who lack capacity.



The MCA also supports those who have capacity and choose to plan for their future – this is everyone in the general population who is over the age of 18.



All professionals have a duty to comply with the Code of Practice. It also provides support and guidance for less formal carers.



The Act's five statutory principles are the benchmark and must underpin all acts carried out and decisions taken in relation to the Act.



Anyone caring for or supporting a person who may lack capacity could be involved in assessing capacity – follow the two-stage test.

MENTAL CAPACITY ACT KEY POINTS – CONTINUED



The MCA is designed to empower those in health and social care to assess capacity themselves, rather than rely on expert testing – good professional training is key.



If capacity is lacking, follow the checklist described in the Code to work out the best interests of the individual concerned.

Mental Capacity Assessment is :

A conversation (or series of conversations), in which you give the person all the information they need to make a decision and assess whether they are able to understand that information, retain it, use, or weigh it and communicate their decision.

Mental Capacity Act 2005

[Mental-capacity-act-code-of-practice.pdf \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270242/mental-capacity-act-code-of-practice.pdf)

THE FIVE STATUTORY PRINCIPLES OF THE ACT

When carrying out the functional capacity test, you have a duty to apply the five statutory principles of the Act, as defined in the table below:

Principle	In Practice
1 A person must be assumed to have capacity unless it is established that they lack capacity.	Every person from the age of 16 has a right to make their own decisions if they have the capacity to do so. Practitioners and carers must assume that a person has capacity to make a particular decision at a point in time unless it can be established that they do not.

THE FIVE STATUTORY PRINCIPLES OF THE ACT – CONTINUED

Principle	In Practice
<p>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.</p>	<p>People should be supported to help them make their own decisions. No conclusion should be made that a person lacks capacity to make a decision unless all practicable steps have been taken to try and help them make a decision for themselves.</p>
<p>3 A person is not to be treated as unable to make a decision merely because he makes an unwise decision.</p>	<p>People have the right to make a decision that others would see as 'unwise'. This does not automatically mean they lack capacity, and they should not be treated as such.</p>
<p>4 An act done, or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.</p>	<p>Anything done for or on behalf of a person who lacks mental capacity must be done in their best interests.</p>
<p>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.</p>	<p>Any action under the Act has to be proportionate and the decision maker should really clarify all possible alternatives to ensure that the individual's freedoms are not overly constrained</p>

Applying the principles will ensure you do not:

- 1) Begin with the presumption that the person lacks capacity to make the decision.
- 2) Focus the assessment on proving this to be so, rather than taking steps to support the person to make their own decision.
- 3) Hide behind the presumption of capacity to avoid responsibility for a vulnerable individual, this happens most often with self-neglect.

Mental Capacity Act 2005 - The 5 principles:

[Mental Capacity Act 2005 - The 5 principles \(scie.org.uk\)](http://scie.org.uk)

Only after applying the principles, and where there is evidence to confirm the person is not able to make their own decision can they be deemed to lack capacity.

DECIDING WHETHER TO ASSESS MENTAL CAPACITY

Indicators that a mental capacity assessment may be required.

If any of the following indicators are present, the person may *not* be able to make their own decision:

-  Lacking a general understanding of the decision that needs to be made, and why it needs to be made.
-  Lacking a general understanding of the likely consequences of making, or not making the decision.
-  Being unable to understand, remember and use the information provided to them when making the decision.
-  Being unable to, or unable to consistently communicate the decision.

There may also be cause for concern if someone:

-  Repeatedly makes an unwise decision that puts them at serious risk of harm, abuse or exploitation; or
-  Makes a particular unwise decision that is obviously irrational or out of character.

Care Act Section 11 Refusal of Assessment

Adults with mental capacity can decline to be assessed. That must be respected other than in limited circumstances.

This section specifies that there are two situations in which the local authority must carry out an assessment of need, even if the adult refuses an assessment.

- (A) the adult lacks capacity to refuse the assessment and the authority is satisfied that carrying out the assessment would be in the adult's best interest, or
- (B) the adult is experiencing or is at risk of abuse or self-neglect.

DECIDING WHETHER TO ASSESS MENTAL CAPACITY – CONTINUED

It is important to acknowledge the difference between an unwise decision, which a person has the right to make (principle 3), and decisions based on a lack of understanding of risks or inability to weigh or use the information about a decision.

Principle 3: 'A person is not to be treated as unable to make a decision merely because he makes an unwise decision. Everybody has their own values, beliefs, preferences, and attitudes. A person should not be assumed to lack the capacity to make a decision just because other people think their decision is unwise. This applies even if family members, friends or healthcare or social care staff are unhappy with a decision.

A guide to carrying out capacity assessments:

[Mental Capacity Guidance Note Capacity Assessment March 2023.pdf](#)
[\(39essex.com\)](#)

Mental-Capacity-Resource Centre (39essex.com)

[Mental Capacity Resource Centre | 39 Essex Chambers](#)

GUIDANCE AROUND ASSESSING EQUIPMENT/TEC

When a person's mental capacity is in doubt, you must assess their ability to make decisions in relation to the proposed occupational therapy provision, in accordance with current legislation and guidance. This requires that you assess their capacity in a four-stage process.

Mental capacity assessment is :

A conversation (or series of conversations), in which you give the person all the information they need to make a decision and assess whether they are able to understand that information, **retain** it, **use or weigh** it and **communicate** their decision.

<https://www.rcot.co.uk/publications/professional-standards-occupational-therapy-practice-conduct-and-ethics>

CONSENT AND CAPACITY TO CONSENT

- ✚ Before a person is provided with any assessment, intervention or treatment, it is necessary to obtain that person's informed consent.
- ✚ 'For consent to be valid, it must be given voluntarily by the individual without pressure or undue influence applied on them. They must be fully informed and provided with all the information that is relevant to their decision. They must have the mental capacity to understand and consent to the particular assessment, intervention or decision.
- ✚ A person's capacity to consent can change. For example, they may have the capacity to make some decisions but not others, or their capacity may come and go.

WHEN SHOULD A MENTAL CAPACITY ASSESSMENT BE CARRIED OUT?

A mental capacity assessment must be carried out when:



There are indicators that the person may not be able to make the decision at the time that it needs to be made; and



There is evidence that the person has (or may have) an impairment of, or disturbance in the functioning of the mind or brain; and



The reason that the person may not be able to make the decision is related to (or may be related to) the impairment in, or disturbance of the functioning of the mind or brain.



Somebody else says they are concerned about the person's capacity, or 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.



The person's behaviour or circumstances cause doubt as to whether they have the capacity to make a decision.

WHERE SHOULD THE ASSESSMENT TAKE PLACE?



To help put someone at ease and so improve their ability to make a decision, careful consideration should be given to both location and timing.

Where was the person? E.g. persons home, care home, hospital. Was it in their own room. Choose a location where the person's privacy and dignity can be properly respected.



Try to eliminate any background noise or distractions (for example, the television or radio, or people talking).

Consider any external influences or signs of distress that might affect their response.



Who should be present when the assessment takes place? Have you considered an advocate?

Consider the time of day and is it the best time of day for the assessment? Try to choose the time of day when the person is most alert – some people are better in the mornings, others are better in the afternoon or early evening. It may be necessary to try several times before a decision can be made.



WHAT IS THE DECISION THAT NEEDS TO BE MADE?

A mental capacity assessment relates to a specific decision that has to be made and is not about a general ability to make decisions. The Salient information relevant to the decision must be identified by the assessor.

Being clear about the decision that needs to be made will help you focus on the questions you need to ask in the assessment.

Be prepared and know your customers' needs, what is their first language, do they use hearing aids, check before sitting down to assess, disruptions affect focus and engagement, so have everything at the ready to help the person. This also refers to having a plan ready in terms of what questions to ask for the specific decision, make sure you are happy on the direction you are going and remember you can vary from this, it is a guide, a starting point to help assess.

As with any assessment, preparation is key. Before the Assessment takes place, you should identify essential questions related to the case that need to be answered in order ensure the process is person-centred, supportive, relevant, and effective.

What information does a person need to understand, retain, and use or weigh to decide upon equipment/adaptations?

Details of the recommended equipment or adaptation (e.g. full body hoist).

Why that equipment or adaptation is required (e.g. person is no longer able to able to weight bear)

The alternative options (e.g. bed-care with pressure relieving mattress)

WHAT IS THE DECISION THAT NEEDS TO BE MADE? – CONTINUED

The likely consequences of deciding one way or another, including ignoring professional advice (e.g. bed-care = less distressing but bed-bound with increased risk of skin breakdown).

In all cases the person assessing capacity must understand the decision to be made and be able to provide all of the relevant information to be able to assess the person's ability to make the decision for themselves.

What are the core topics surrounding the decision? ensure they are relevant and directly related to the decision being made.

It is important not to assess someone's understanding before they have been given relevant information about a decision.

JB SUPREME COURT CASE

The two-stage test of capacity.

The current code incorrectly states that, when assessing capacity, the diagnostic test should be considered before the functional test. An assessor should firstly consider whether the person is able to make the decision, and if not, whether there is an impairment or disturbance in the functioning of the mind or brain causing their inability to make the decision (4.12 and 4.21). This reflects the Supreme Court decision in [JB v A Local Authority \[2002\] UKSC 52](https://www.supremecourt.uk/cases/docs/uksc-2020-0133-judgment.pdf) (https://www.supremecourt.uk/cases/docs/uksc-2020-0133-judgment.pdf)

At the time of writing this guidance the Mental Capacity Act code of practice is currently being revised and updated.

STAGE 1: DOES THE IMPAIRMENT OR DISTURBANCE MEAN THE PERSON IS UNABLE TO MAKE THE DECISION?

1) Is the person able to understand the information relevant to the decision?

The person must be able to understand the nature of the decision and the consequences. The understanding doesn't need to be in depth, broad understanding is acceptable under the MCA 2005

Before starting the assessment, you should identify the information relevant to the decision and then provide the information to the person being assessed. Relevant information includes:

-  The nature of the decision
-  The reason why the decision is needed, and
-  The likely effects of deciding one way or another, or making no decision at all
-  Fundamental information – nature of the decision (what) plus the purpose for which it is needed (why) plus reasonable, foreseeable consequences,
-  Questions should aim to elicit whether or not the person has an awareness of salient issues: For example, what is X piece of equipment/device or adaptation for?
-  How could it help you? What could happen to you if you were to fall out of your bed/chair/wheelchair etc.?
-  Don't forget to ask the person about the decision in question: I'm recommending either a floor bed or a hospital bed with rails? Which option do you want?
-  If the person struggles to understand open questions or has communication difficulties it would then be appropriate to switch to closed questions but do check the reliability of the person's yes/no response e.g. Do you walk unaided? Followed by do you walk with a mobility aid?

STAGE 1: DOES THE IMPAIRMENT OR DISTURBANCE MEAN THE PERSON IS UNABLE TO MAKE THE DECISION? – CONTINUED

1) Is the person able to understand the information relevant to the decision? Continued

- ✚ Explain the effects the decision might have on the person and those close to them – including the people involved in their care. For example, if you are talking about a placement, explain the difference between living there and visiting it (short term v long term). What activities they would or wouldn't be able to do? How/when would they be able to see friends and family? What sort of care would be provided in broad terms and explain any difference from living at home. The do's and don'ts of living in a placement. Who would they be living with (broad terms)? How would it be paid for (not detailed information) – explain for each option.
- ✚ Take time to explain anything that might help the person make a decision.
- ✚ Does the person have all the relevant information they need to make a particular decision? Information given can be basic and simple (salient points) including using pictures or brochures for care homes for example.
- ✚ All possible help must be given to the person to understand the information, including using simple language. What support can be provided to enable decision making?
- ✚ If they have a choice, have they been given information on all the alternatives this includes equipment and TEC .
- ✚ Good evidence- recording what the person said in response to questions this provides the evidence of how the assessor reached their conclusion they could not understand or use/weigh the information etc.

STAGE 1: DOES THE IMPAIRMENT OR DISTURBANCE MEAN THE PERSON IS UNABLE TO MAKE THE DECISION? – CONTINUED

2) Is the person able to retain the information relevant to the decision?

- ✚ The information only needs to be retained for long enough to make the decision in question. There is no set time limit for how long this is.
- ✚ There is no set number of minutes or hours the person must remember information in order to pass the mental capacity assessment the information could be forgotten an hour later, and their decision would still be valid it may be that if the person was presented with the same information they would come to the same conclusion.
- ✚ The person only needs to have capacity at the time the decision needs to be made. It might be necessary to repeat the discussion again at another time before the action is taken to demonstrate that the person's decision is the same.
- ✚ The mental capacity is not the same as a memory test the reason the person needs to retain information relevant to the decision is to enable them to get to the stage of using away in that information or in other words processing the information.
- ✚ At the end of the assessment, ask the person to recite the key points of the relevant information: *For example, please can you give me a summary of what we have just discussed?, Please can you tell me what equipment or care and support I am recommending?*
- ✚ For people with communication difficulties, it would be appropriate to use written words or visual aids to establish whether the person recalls the key information a short while after it has been provided; for example, show a person pictures of different items of equipment and ask: *Which of these have I recommended?*

STAGE 1: DOES THE IMPAIRMENT OR DISTURBANCE MEAN THE PERSON IS UNABLE TO MAKE THE DECISION? – CONTINUED

3) Is the person able to use or weigh that information as part of the decision-making process?

- ✚ The ability to use or weigh information as part of the decision-making process means the person accepts the information and takes it into account.
- ✚ Difficulties with executive functioning may mean the person cannot use or weigh the fact that there is a mismatch between what they say and what they do.
- ✚ The person should be able to demonstrate that they understand the consequences of the decision.
- ✚ A person may understand the information but not be able to use or weigh it (believe, take it into account).
- ✚ For example- understand they are in a care home but deny they have any illness or care needs (denial, lack of insight).
- ✚ The ability to use or weigh can be affected by phobias, delusions, compulsive disorders, lack of insight, coercive relationships.
- ✚ A person may understand the information but not be able to use or weigh it. For example, they may understand they are in a care home and what the assessor means by care needs but not except they have any illness or care needs themselves. Evidence must be provided and not solely on opinion that they could not use or weigh the information.

3) Is the person able to use or weigh that information as part of the decision-making process? - Continued

- ✚ **Another example**, a person in hospital following a stroke may understand that they have mobility problems and that they need a hoist to transfer. However, due to cognitive impairment, they do not accept that they will require this support at home. They insist that once home, they will be functionally independent, despite clear evidence to the contrary. It is therefore unlikely that they would be able **use or weigh** information about their functional ability, in order to make decisions about equipment and care upon discharge
- ✚ Questions should aim to find out how the person has made the particular decision and what factors they have taken into account: How do you think this equipment will benefit you? Why are you refusing equipment? How will you manage.
- ✚ Explore their thoughts/feelings are about a particular issue: How do you feel about having equipment in your house? What are your objections/concerns?
- ✚ Explore the risks & benefits: How could this equipment help you? What are the risks of doing the particular transfer/activity without equipment/assistance? Why do you think others are concerned?
- ✚ Respectfully question the person's beliefs and assumptions about a particular issue e.g. are they unable accept risks due delusions/confabulations or for some other reason.

STAGE 1: DOES THE IMPAIRMENT OR DISTURBANCE MEAN THE PERSON IS UNABLE TO MAKE THE DECISION? – CONTINUED

4) Is the person able to communicate their decision (whether by talking using sign language or any other means)?

- ✚ For the purpose of the mental capacity assessment, simply being able to communicate is not enough; the person needs to be able to communicate their decision.
- ✚ Communicating a decision does not mean communicating the reasons. So, a person may have communicated their decision (after understanding, retaining, using, or weighing up the relevant information) by simply saying “yes” or “no”.
- ✚ Most people will fail the mental capacity assessment on the first three stages of the functional assessment. Only a very small number of people will be able to do the first three parts (understand, retain, and use or weigh) and then fail on the requirement to communicate the decision.
- ✚ A person who is unconscious or has locked in syndrome cannot communicate but other people may be able to make noises or blink eyes. If they can, then it would be usual to record that they could communicate but they could not show they understood the information. Also, a full description of their response (or lack of response) to questions.
- ✚ Could anyone else help with communication (for example, a family member, support worker, interpreter, speech and language therapist or advocate)?
- ✚ Have different methods of communication been explored if required, including non-verbal communication?

STAGE 1: DOES THE IMPAIRMENT OR DISTURBANCE MEAN THE PERSON IS UNABLE TO MAKE THE DECISION? – CONTINUED

4) Is the person able to communicate their decision (whether by talking using sign language or any other means)? - Continued

- ✚ If the person does not use verbal communication skills, allow more time to learn how to communicate effectively
- ✚ It may be important to provide access to technology. For example, some people who appear not to communicate well verbally can do so very well using computers.
- ✚ If a person cannot communicate their decision in any way at all, the Act says they should be treated as if they are unable to make that decision. Before deciding that someone falls into this category, it is important to make all practical and appropriate efforts to help them communicate.
- ✚ Give examples of what the person said or how they responded to questions.
- ✚ Could a Speech & Language Therapist or other professional help?
- ✚ Test whether the person can respond to simple closed questions by nodding or shaking their head etc. (check reliability of yes/no response).
- ✚ Record the person's response/lack of responses. Corroborate your findings with family members and other professionals.

STAGE 2: DOES THE PERSON HAVE AN IMPAIRMENT OF, OR A DISTURBANCE IN, THE FUNCTIONING OF THEIR MIND OR BRAIN (WHETHER PERMANENT OR TEMPORARY)?

For a person to lack mental capacity, they must have an impairment of, or a disturbance in the functioning of the mind that is causing the incapacity.

The MCA code of practice gives some examples:

- + Conditions associated with some forms of mental illness
- + Dementia
- + Significant learning disabilities
- + The long-term effects of brain damage
- + Physical or medical conditions that cause confusion, drowsiness, or loss of consciousness
- + Delirium
- + Concussion following a head injury
- + The symptoms of alcohol or drug use

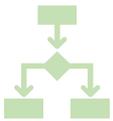
The need to identify an impairment or disturbance does not mean a doctor has to make a formal diagnosis at the time of the mental capacity assessment. In many circumstances, the person could have a prior diagnosis such as dementia made many years earlier.

Sometimes formal diagnosis may not be possible, and staff will have to use the act based on reasonable belief a person has an impairment of or a disturbance in the functioning of the mind or brain.

STAGE 3: EXPLAIN WHY THE PERSON IS UNABLE TO MAKE THIS SPECIFIC DECISION BECAUSE OF THE IMPAIRMENT OF, OR DISTURBANCE IN THE FUNCTIONING OF, THE MIND OR BRAIN



For a person to lack capacity, they must have an impairment of or a disturbance in the functioning of their mind or brain that is causing the incapacity.



This requirement in the Act to find a link between a person's incapacity and the impairment or disturbance (referred to as the causal link or causative Nexus) means that other reasons people might be unable to make a decision do not mean they lack capacity.



Be specific in how their impairment or disturbance of the brain affects their ability to make this specific decision.



This part of the assessment can be difficult for assessors to express.

A good example from an assessor in practice:

Mrs. Smith is unable to retain information relevant to the decision due to her memory loss and is unable to weigh information relevant due to her impaired judgement. these are both symptoms of vascular dementia, which is a permanent impairment of the brain. it is because of this impairment that she is unable to make her own decisions about being accommodated at the nursing home to receive care.

STAGE 3: EXPLAIN WHY THE PERSON IS UNABLE TO MAKE THIS SPECIFIC DECISION BECAUSE OF THE IMPAIRMENT OF, OR DISTURBANCE IN THE FUNCTIONING OF, THE MIND OR BRAIN – CONTINUED

Executive Functioning

- ✚ Consider and explain how a person's difficulties with executive functioning mean that they cannot make the decision for purposes of the MCA. If this is not explained, then it's not a capacity determination.
- ✚ A key question is whether the person is aware of their own deficits – can they understand (or use and weigh) the fact that there is a mismatch between their ability to respond to questions in the abstract and to act when faced by concrete situations?
- ✚ This is where a person gives coherent answers to questions but is unable to give effect to their decision.
- ✚ If the person cannot understand (and/or use and weigh) the fact that there is a mismatch between what they say and what they do when required to act, it can be said that they lack capacity to make the decision in question. However, this conclusion can only properly be reached when there is clear evidence of repeated mismatch, and a single assessment is unlikely to be adequate.
- ✚ Also see page 30

WERE ALL PRACTICABLE STEPS TAKEN TO HELP THE PERSON MAKE THE DECISION?

It is important to do everything practical (the Act uses the term 'practicable') to help a person make a decision for themselves before concluding that they lack capacity to do so.

This aims to stop people being automatically labelled as lacking capacity to make particular decisions because it encourages individuals to play as big a role as possible in decision-making.



Principle two of the Mental Capacity Act: a person is not treated as unable to make a decision unless all practical steps to help them to do so have been taken without success.

Did you consider that enough has been done to help the person understand, retain etc? E.g. providing information in a more accessible form (for example, photographs, or drawings).



If they have a choice, have they been given information on all the alternatives?

Did you assess at the best time of day for the individual, quiet room, away from distractions such as activities, a person they know and trust was involved, were they in pain, were they distressed in any way.



WERE ALL PRACTICABLE STEPS TAKEN TO HELP THE PERSON MAKE THE DECISION? – CONTINUED



Do the practicable steps taken relate to why the person lacks capacity - communication problem - use of a speech therapist.

Speak at the right volume and speed, with appropriate words and sentence structure. It may be helpful to pause to check understanding or show that a choice is available.



Have you supported the person with all practical steps possible? Explain and provide your evidence.

Are there any steps that you would have thought of but could not implement? Have you explained why they were not used.



CAN THE DECISION BE DELAYED BECAUSE THE PERSON IS LIKELY TO REGAIN CAPACITY IN THE NEAR FUTURE?

The Act states the decision maker must consider:

- 1) Whether it is likely that a person will at some time have capacity in relation to the matter in question.
- 2) If it appears likely that the person will regain capacity when it is likely to be. In these cases, the decision should be delayed wherever possible.

CAN THE DECISION BE DELAYED BECAUSE THE PERSON IS LIKELY TO REGAIN CAPACITY IN THE NEAR FUTURE? – CONTINUED



If the person's capacity is likely to improve in the foreseeable future, wait until it has done so – if practical and appropriate. For example, this might be the case after treatment for depression or a psychotic episode. Obviously, this may not be practical and appropriate if the decision is urgent.

If the decision cannot be delayed (for example, because treatment is urgent) or the person's mental capacity is unlikely to improve, clearly state the reasons.



Avoid or challenge time limits that are unnecessary if the decision is not urgent. Delaying the decision may enable further steps to be taken to assist people to make the decision for themselves.

Where a person currently lacks capacity to make a decision relating to their day-to-day care, the person may – over time and with the right support – be able to develop the skills to do so. Though others may need to make the decision on the person's behalf at the moment, all possible support should be given to that person to enable them to develop the skills so that they can make the decision for themselves in the future.



CAPACITY OUTCOME

The outcome of the mental capacity must be that either:

- + The person has capacity to make the decision; or
- + The person lacks capacity to make the decision

The Act states that the burden of proof lies with the assessor to prove a person lacks capacity and not vice versa. The assessor must explain what the person is unable to do.

The standard of proof required is on the balance of probabilities in other words, what is more likely than not.

Anybody who claims that an individual lacks capacity should be able to demonstrate their evidence base for this. They need to be able to show, on the balance of probabilities, that the individual lacks capacity to make a particular decision, at the time it needs to be made (section 2(4)). This means being able to show that it is more likely than not that the person lacks capacity to make the decision in question. The evidence used to make the determination should be clearly recorded.

CAPACITY OUTCOME – CONTINUED

The evidence that has been used to confirm the presence of an impairment or disturbance of the mind or brain:

- ✚ The decision to be made.
- ✚ The relevant information that has been provided to the person.
- ✚ The practicable steps that have been taken to support the person to make their own decision.
- ✚ The outcome of each element of the functional test of capacity.
- ✚ The reason that the person has been deemed to have, or to lack capacity to make the decision for themselves; and
- ✚ Where the person has been deemed to lack capacity, the consideration that has been given to delaying the decision.

COERCION AND UNDUE INFLUENCE

The person may be subject to coercion or undue influence if:

1) They find it difficult to make a decision; but

2) They do not have an impairment of, or disturbance in the functioning of the mind or brain; or

3) That disturbance or impairment is not likely to be the reason they are unable to make the decision.

COERCION AND UNDUE INFLUENCE – CONTINUED

Examples:

Isolation:



Cutting off or limiting contact with family and friends, so a supportive network is lost.

Financial Control:



Withholds or limits access to money.

If this is the case, a safeguarding concern may need to be raised in order to protect them from the effects of the coercive or controlling behaviour or others.

WHAT IS EXECUTIVE FUNCTIONING?



Executive function can be described as “the management system of the brain.”

Executive function is a set of mental skills that include working memory, flexible thinking, and self-control. We use these skills every day to learn, work, and manage daily life.



WHAT IS EXECUTIVE FUNCTIONING?



When people struggle with executive function, it can impact in many areas in life. It can inhibit appropriate decision-making and reduce a person's problem-solving abilities and can make it hard to focus, follow directions, and handle emotions, among other things.

It is important to assess both decisional and executive capacity:

- Decisional capacity, covered by the Mental Capacity Act, is where a person can show that they can understand, retain, use, and weigh up the information needed to make a decision.
- In contrast, executive capacity is the ability for a person to actually carry out that decision. The person may give superficially coherent answers to questions, but it is clear from their actions that they are unable to carry into effect the intentions expressed in those answers.



Professionals assessing capacity where there are deficits in executive functioning are faced with a number of obstacles that make determination of capacity more challenging. This can have significant implications because failing to carry out a sufficiently thorough capacity assessment in these situations can expose a vulnerable person to substantial risk.

When mental capacity assessments must delve beneath what people say to what they do - Community Care

<https://www.communitycare.co.uk/2020/10/28/mental-capacity-assessments-must-delve-beneath-people-say/>

EXAMPLE OF QUESTIONS, CONVERSATIONS AND THINGS TO CONSIDER

Establish whether there is a donee of a Lasting Power of Attorney, or a Deputy appointed by the Court and arrange for them to be involved.

- ✓ Remember to start from the assumption they have capacity and test them from the same level as anyone else.
- ✓ Don't have unreasonable expectations.
- ✓ Establish how the person is currently supported to make decisions and the kind of decisions they are able to make.

Examples:

- + I am here to see you today as there have been concerns about...
- + Family/friends/carers/health staff are concerned that...
- + Do you know what the concerns are about?
- + Can you tell me what you understand?
- + How do you feel about that?
- + Can you tell me about your health? How does this affect you?
- + I know that family/friends/carers/nursing staff are helping you with....
What would happen if they were not there?
- + How would you cope? How do you manage?
- + A decision has to be made about..... (this is where the viable options should be put to the person)

EXAMPLE OF QUESTIONS, CONVERSATIONS AND THINGS TO CONSIDER – CONTINUED

Top Tips:

- + Don't rush – allow the person time to think things over or ask for clarification, where that is possible and appropriate
- + Take one decision at a time – be careful to avoid making the person tired or confused.
- + Avoid questions that need only a 'yes' or 'no' answer (for example, did you understand what I just said?). They are not enough to assess the person's capacity to make a decision. But there may be no alternative in cases where there are major communication difficulties. In these cases, check the response by asking questions again in a different way.
- + Check the person's understanding after a few minutes. The person should be able to give a rough explanation of the information that was explained.

Social Care Institute for Excellence

 <https://www.scie.org.uk/mca>

 Mental Capacity Act 2005 at a glance | SCIE

<https://www.scie.org.uk/mca/introduction/mental-capacity-act-2005-at-a-glance>

 Mental Capacity Act videos | SCIE

<https://www.scie.org.uk/mca/videos>

BU Bournemouth University

 Mental Capacity Act toolkit

<https://mentalcapacitytoolkit.co.uk/>

Research in Practice

 Mental capacity through a strengths-based lens | Research in Practice

<https://www.researchinpractice.org.uk/adults/news-views/2020/july/mental-capacity-through-a-strengths-based-lens/>

 Exploring Complexity: Mental Capacity Assessment: Webinar | Research in Practice

<https://www.researchinpractice.org.uk/adults/content-pages/videos/exploring-complexity-mental-capacity-assessment-webinar/>

Mental Capacity Law and Policy Resources – Alexander Ruck Keene

 Mental Capacity Law and Policy

<https://www.mentalcapacitylawandpolicy.org.uk/>

 Shedinars – Mental Capacity Law and Policy

<https://www.mentalcapacitylawandpolicy.org.uk/shedinars/>

Mental Capacity

 Flashpoints - Capacity guide

<https://capacityguide.org.uk/flashpoints/>

 Example Mental Capacity Assessments – Mental Capacity Ltd (mental-capacity.co.uk)

<https://mental-capacity.co.uk/example-mental-capacity-assessments/>

39 Essex Chambers regularly produces case reports, articles, newsletters and seminar across a range of areas.

 Capacity Assessments Guide (39essex.com)

- <https://www.39essex.com/docs/newsletters/capacityassessmentsguide31mar14.pdf>

 Mental Capacity Article Archives - 39 Essex Chambers

- <https://www.39essex.com/tag/Mental-Capacity-Article/>