

# Decision Making, Consent, and Mental Capacity.

## 5 Principles of the Mental Capacity Act 2005

1. **Presumption of capacity:** Always assume the person is able to make the decision until proven otherwise.
2. **Support to make a decision:** Try everything possible to support the person in making their own decision.
3. **Ability to make unwise decisions:** Do not assume lack of capacity just because a decision seems unwise.
4. **Best interests:** Decision-making must prioritise the person's best interests.
5. **Least restrictive:** Any intervention should be with the least restriction possible

## What is a mental capacity assessment?

A mental capacity assessment is, in many ways, an attempt to have a real conversation with the person on their own terms and applying their own values and beliefs.

Carrying out a mental capacity assessment on someone is not neutral. The assessment process itself can often be seen as intrusive to the individual and can interfere with their right 'to respect for private and family life' (under Article 8 Human Rights Act). Therefore, you must always have grounds to consider that one is necessary. Conversely, you must also be prepared to justify a decision not to carry out an assessment where, on its face, there appeared to be a reason to consider that the person could not take the relevant decision(s). It is important to understand that it is not only medical professionals (and in particular, psychiatrists) who can carry out a mental capacity assessment.

There will be some circumstances where a medical professional's expertise will be required, but that is because of their expertise, not because of the position that they hold. Another common area of difficulty is where a person gives 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 (in other words, their so-called 'executive function' is impaired).

It can be very difficult in such cases to identify whether the person in fact lacks capacity within the meaning of the MCA, but a key question can be whether they are aware of their own deficits – in other words, whether they are able to use and weigh (or understand) 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. Sometimes individuals who appear to self-neglect, may do so because of an inability to action their intentions, or to make the linkage between intent and actions.

## **Pre-Mental Capacity Considerations, Decision Making and Consent**

Regardless of someone's mental capacity, they can only be considered to have made a valid decision or provided valid consent, if they have received the **relevant information** in order to make an **informed decision** or provide **informed consent**.

It is best practice to identify what relevant information the person may require to make an informed decision. The information you provide to the person needs to include the likely consequences of the decision but be careful not to make this unnecessarily complicated for the person.

When you are discussing and providing the relevant information with the person, you will be making a judgement whether the person can:

- Understand the information.
- Hold and retain the relevant information long enough in their minds to be able to think about and give a response.
- Be able to use the information to weigh up the likely pros and cons of the decision options.
- Be able to communicate their decision to you.

These are the four key functions of decision making as defined by the Mental Capacity Act. If the person appears to be doing all of these, then they will be making the decision for themselves. The professional will need to gain either verbal consent from the person which is witnessed or ask the person to sign a document explaining the decision required and the person's response. This should then be recorded by the professional in the Council's data base on the person's client's case notes.

A proportionate level of documentation should be adopted, depending upon the type and consequences of the decision. A larger decision with significant consequences will require the use of the Standard Assessment of Mental Capacity Form that is situated within the Mental Capacity Policy on Policy Portal.

If you have a reasonable belief that the person is unable to do all four of these things, and that it doesn't feel as though the person appears to be able to make the decision for themselves, then you will need to arrange for an assessment of the person's mental capacity in regard to the particular decision.

For further information as to what constitutes 'valid consent' please see the Information Commissioners Office guidance [What is valid consent? | ICO](#).

## **Mental Capacity Assessment**

***A person lacks mental capacity in relation to a matter if at the material time they are unable to make a decision for themselves in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.***

***It does not matter whether the impairment or disturbance is permanent or temporary.***

Is there a reason why the person's mind or brain is impaired or not functioning properly? This could be due to an enduring issue or illness like a brain injury or dementia but could also be due to a temporary impairment like alcohol, drugs, delirium, after an epileptic fit etc. If it is due to a temporary condition, please consider whether the decision making can be delayed until any issues have resolved. If the decision cannot be delayed (e.g. in an urgent or emergency situation), then please be very clear about this in your recorded mental capacity assessment. For example, record why you have to complete the assessment without delay and why your conclusion and outcome is only applicable at this specific time. This is your recorded defensible decision making as to why you could not wait to undertake the assessment of capacity at a later date.

If there is no clear reason why the person's mind/brain isn't functioning properly, but they appear to be struggling to make the decision please try other ways to support the person to make the decision, requesting support from people who know the person well or other professionals.

If an impairment or disturbance is identified, please consider if this is directly making the person unable to make the decision and explain why in your recorded assessment/persons case notes. It is not sufficient to just conclude that someone lacks capacity for a decision just because they have an impairment or diagnosis.

Please fully record your conclusion in the assessment/persons case notes. A proportionate level of documentation should be adopted, depending upon the type and consequences of the decision a larger decision with significant consequences will require the use of the Mental Capacity Assessment template. The most current version of this template can be accessed in the Policy Portal.

If you have concluded that the person does not have the mental capacity to make the decision, then please proceed to the best interest decision making stage.

## **Best Interests Decision Making: Identifying the Decision Maker When a Person Lacks Capacity**

The issue of whether there is anybody who has the legal authority to make decisions on behalf of the person must be established whether there is anyone who has been registered as the person's Attorney for Financial matters. Property and Affairs could be a Lasting Power of Attorney (LPA) or an Enduring Power of Attorney (EPA), or for

Health and Welfare decisions (LPA only), or whether there is a Court Appointed Deputy, where the decision falls within the scope of their role. Proof of this should be provided by any Attorney or Deputy, and it is best practice to retain a copy of this on the person's file for future reference.

An Attorney or Deputy would be the decision maker for the person, there is an expectation upon any LPA or Deputy to have regard to the Mental Capacity Act and its Code of Practice when making best interests' decisions for the person. As practitioners, your role is to guide and advise them with this decision making.

If you have any concerns with the best interest decision making of any LPA or Deputy that is not able to be resolved by discussion and the offer of advice, please seek advice from your line manager/supervisor and consider whether a discussion together with CMBC legal colleagues is required.

If there is nobody with the legal authority to make decisions on the person's behalf, then the professional who is proposing the action/care/treatment will be the decision maker. If this is not CMBC Adult Social Care, then please liaise with the relevant professional to ensure that they are aware of their responsibility. Support and advice may be offered to them, but CMBC staff cannot make best interests' decisions with regard to actions or treatment proposed by other professionals.

For a Best Interests Decision that are being made by CMBC, please proceed to Best Interests Decision Making Identifying the Available Options stage.

## **Best Interests Decision Making: Identifying the Available Options**

Unless the person is funding their care privately, the identification of available options to the person will be established through the Care Act need assessment and funding decisions by CMBC. A decision by the health or social care professional/s as to what options to offer, **must** take into account the relevant duties upon social care professionals in England, the duties imposed upon the local authority upon whose behalf they act to assess and meet eligible needs by the Care Act 2014. This is not a best interest's decision because it is not a decision that the person themselves would take.

## **Best Interests Decision Making: Risk Assessments and Best Interests Decision**

A best interest's decision is one that is reached by the collaborative process that utilises a balance sheet approach on the person's behalf as to which option to accept. Any risks identified should be assessed using the 'Positive Risk Templates' that can be found in the MCA Policy Appendices in the Policy Portal.

Two forms of the templates are similarly available within the MCA Policy in the Policy Portal. One is for a best interest decision making process that consists of a series of separate conversations, and the other is a Best Interests meeting document template. Balance sheets are included in both templates.

If there are any conflicting viewpoints or disagreements that cannot be resolved following a Best Interests meeting, please seek advice from your line manager/supervisor and consider whether a discussion together with CMBC legal colleagues is required.

Consideration must be given as to whether the chosen option may deprive the person of their Liberty. If it appears that it will, then please flag this up to the Care Home or Hospital, or if in a community setting, please seek advice from your line manager/supervisor and consider whether a discussion together with CMBC legal colleagues is required.

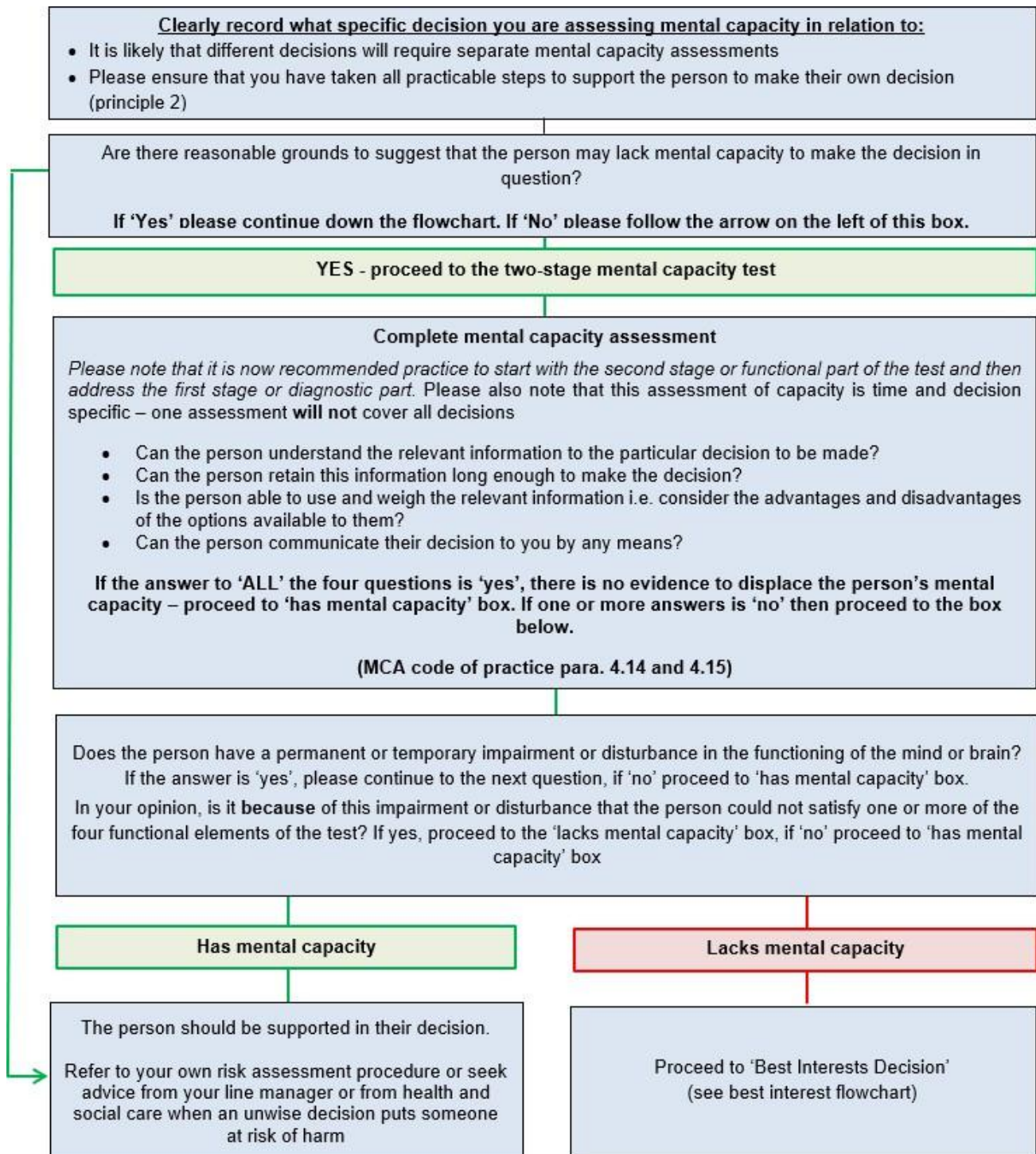
## **Restrictions**

The Mental Capacity Act does not give anyone the “*power to restrain*”, However, if you can demonstrate that proportionate restraint was unavoidable, proportionate to the risk and degree of harm to a person who doesn’t have the mental capacity to understand and choose to take the risk for themselves, then the MCA will give you protection from liability (this relies upon documentary evidence).

Further guidance can be found at:

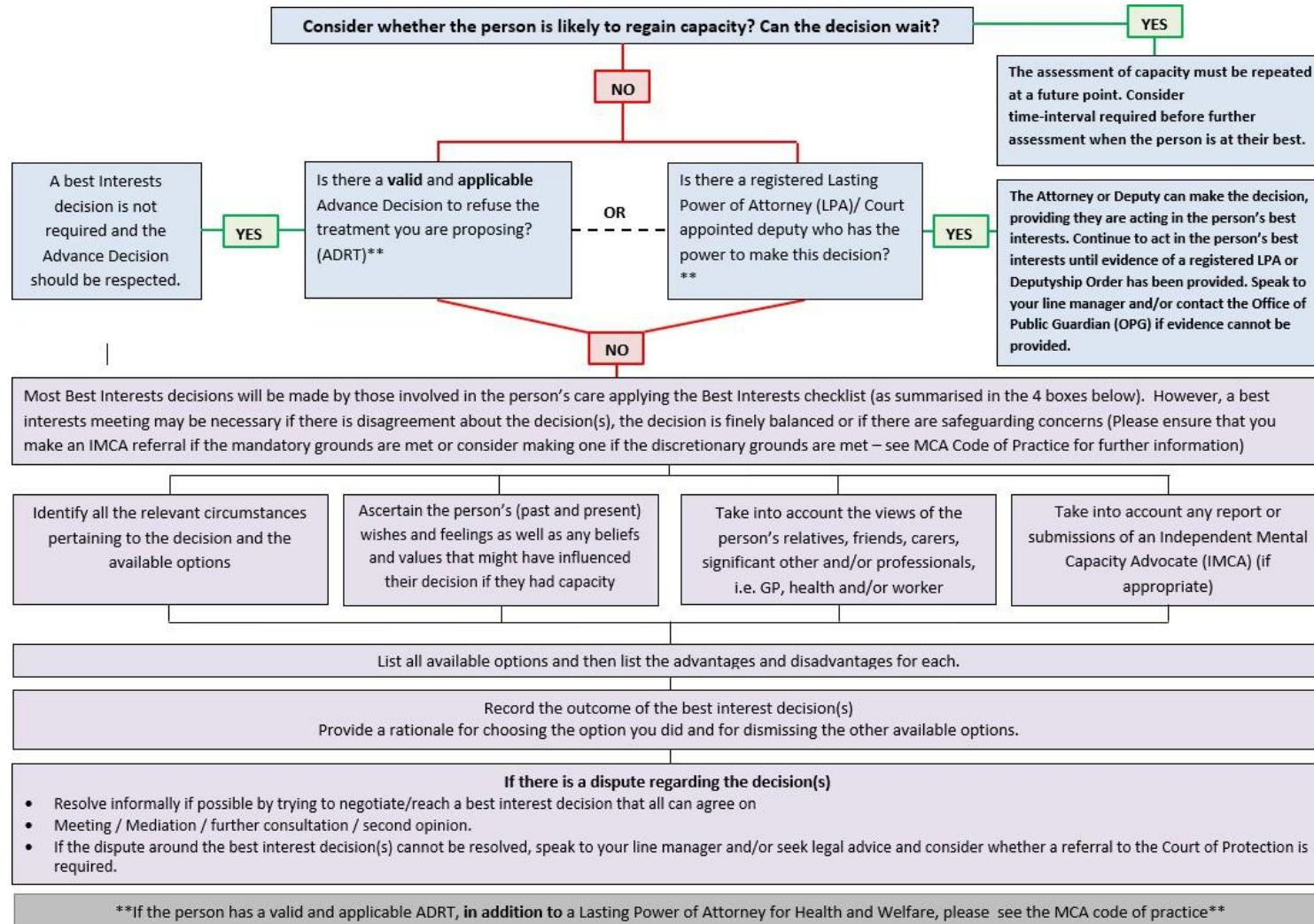
[Promoting less restrictive practice: reducing restrictions tool for practitioners | Local Government Association](#)

## Appendix A: Mental Capacity Assessment Flow-Chart





## Appendix B: Best Interest Decision Flow-Chart



## Appendix C: Fluctuating and Temporary Capacity

The term 'fluctuating capacity' is not a concept expressly addressed or provided for in the MCA, although it is referred to in the Code of Practice.

**It is important to distinguish between two different potential situations:**

### What is fluctuating capacity?

A person with fluctuating mental capacity, such as a person with bi-polar disorder, is someone whose mental impairment may lessen or become more severe over time which means that they may have periods when they are perfectly capable of making decisions and other times when they are not.

The fluctuation in someone's mental capacity can take place over a matter of days or weeks, or even over the course of each day. For example, for some people with dementia, their cognitive abilities may be significantly less impaired at the start of the day than they are towards the end. This must be considered when supporting them to make a decision or assessing their mental capacity.

### How to address fluctuating capacity?

Consider whether the decision that you need the person to make is one that can wait. If it can, then delay it until the person may be able to be supported to make their own decision.

If the decision(s) cannot wait, then assess the person's mental capacity and follow the Best Interests decision making process as normal. However, be mindful that further and regular assessments may be required if the person's mental capacity fluctuates.

### What is temporary capacity?

A person who has a temporary impairment of the mind or brain that affects their ability to make decisions, an example being a person suffering from a severe urinary tract infection and experiencing confusion as a result of this. Other examples would include a person who was unconscious, had a severe head injury or even the effects of alcohol or drugs.

### How to address temporary capacity?

In short, this is very like the situation of fluctuating capacity insofar as if possible, delay the decision(s) until the person has regained mental capacity.

However, if the decision cannot be delayed, then assess mental capacity and follow the Best Interests decision making process as normal. It would be prudent to keep any mental capacity assessment under review and be prepared to re-assess when there are indicators that the person's cognitive abilities have improved and that they may have regained capacity.

It is of note that all mental capacity assessments must be kept under review, but this is arguably even more important for those people whose mental capacity fluctuates or whose loss of mental capacity is thought to be of a temporary nature.