Waltham Forest Safeguarding Adults Board

Guidance to Assessing Mental Capacity and Making Best Interests Decisions

Created by partners of the Safeguarding Adults Board

Version Number	Purpose	Author	Summary of Changes	Implementation Date	Approved By	Last Review Date	Next Review Date
2.0	To provide guidance on mental capacity to professionals working with residents in Waltham Forest	Created by members of Strategic Partnerships' Mental Capacity steering group	Addition of information on fluctuating capacity and greater number of case studies included	Nov 2023	Safeguarding Adults Board	Nov 2023	Nov 2025

Foreword from Deborah Cohen, Independent Chair Safeguarding Adults Board

This guidance updates the earlier version published in June 2021. At that time, the Waltham Forest Safeguarding Adults Board (SAB) had recently commissioned a Safeguarding Adult Review, which identified the need for a refocus on the application and culture of mental capacity assessments and professional curiosity. The importance of ensuring that all clinicians and practitioners are competent in recognising the need and carrying out mental capacity assessments has not diminished in the time since then.

The Strategic Partnership has recently completed its biennial priority setting and mental capacity remains a priority area of working. The decision to keep mental capacity in the spotlight is in part on account of a need to refresh practice on deprivation of liberty safeguards.

Some of the changes made in this guidance include:

- The section on fluctuating and temporary capacity has been updated to cover those who abuse substances, neurodiversity, and adverse health conditions. These are areas where more guidance has been requested
- The section on consent has been updated to include references to how to assess a person's "competency" to make a particular decision
- The case studies and their presentation have been updated
- POhWER is contracted as Waltham Forest's new Independent Mental Capacity Advocacy service
- For more information on the Safeguarding Adults Board, please see the SAB webpage

Advocacy remains of the highest importance to those needing care and support. I welcome the addition to this guidance of an appendix on how to assess general advocacy (which is an entitlement for those who meet Care Act thresholds) for those who, while having mental capacity, might need or benefit from the support of an advocate.

The work continues to be steered by a working group of multi-agency professionals who contribute to this work on top of their day job. I would like to thank the members for their commitment to this work.

Finally, look out for the ongoing training on mental capacity and DOLS and please sign up for the courses.

Deborah Cohen

Contents

Waltham Forest's 'Mental Capacity Charter':

The Mental Capacity Act 2005 (MCA) is a legal framework, designed to protect and empower people who may lack the mental capacity to make their own decisions. The Act is underpinned by five key principles, which every professional must follow (see page 5).

In Waltham Forest, we pledge to:

- Recognise and support a person's human right to make specific and timely decision, which also includes supporting them to plan for the future in a time they may lose capacity to make important life decisions with regards to their health & welfare and/or property and finance
- View the 'assessment of mental capacity' not simply as a process, but as an opportunity for a meaningful conversation with the person
- Continue to support, ensure information is understood and attempt to engage with people who may have made what could be construed as an 'unwise decision.' Don't walk away
- To consider the importance of the person's present and past wishes, feelings, values and beliefs when making any best interest decision
- To promote and raise awareness of the importance of referring to advocacy services, such as IMCA (Independent Mental Capacity Advocate), IMHA (Independent Mental Health Advocacy) etc. This also includes raising awareness, promoting and referring carers to support services
- To promote public and professional awareness of the act with regards to enabling adults to make advanced decisions and plan ahead of time in the future when they might lack capacity to make important life and care decisions
- Support approaches where risk is viewed positively, thereby enhancing less restrictive practice, service provisions and intervention
- Promote good MCA practice/interventions through a culture of improvement and learning
- To raise awareness with regards to the Deprivation of Liberty Safeguards and ensuring timely referrals are being made
- For services to have access to the MCA policies, procedures and training. Other providers to be signposted and made aware of external multi-agency procedures, guidance and MCA training

Introduction

This guidance was originally published in June 2021. In this first updated version (September 2023), we have made some changes due to the passing of time and the desire to publish guidance that can support a broader range of professionals to be able to assess capacity and make defensible best interests decisions in accordance with the Mental Capacity Act 2005 (MCA). At the time of writing, the original MCA code of practice is still in use, although there have been recent calls at a national level for the code to be updated despite the fact that the Liberty Protection Safeguards have been put on hold by the Government. If this happens, then this document should be read in conjunction with such a revised code.

In this update, we have gone for a more service specific approach and this is reflected in the numerous case studies that this document will provide links to. The hope being that if you can read case studies specific to your own area of work, then this might help your understanding of how to apply the Act in your day-to-day practice.

We have also re-written the sections on 'fluctuating capacity' and 'executive functioning.' Although the current MCA code says little about this, there have been a number of high-profile self-neglect cases that have highlighted a lack of understanding about these issues and so we have tried to provide some more guidance on this complex area of practice.

The guidance primarily introduces two flowcharts to support practitioners to assesses capacity and make best interests decisions.

The Mental Capacity Act in brief:

In summary, the MCA and MCA code provide a statutory framework to empower and protect those who may lack capacity to make decisions or consent to service provision because of a mental impairment. The code sets out who can take decisions, in what circumstances, and how they should do this. The MCA also enables adults to plan ahead for a time in the future when they might lack capacity, by giving them the opportunity to appoint a Lasting Power of Attorney (for property and finance and/or health and welfare) and make Advanced Decisions or Statements.

The MCA code also places a duty on all staff (e.g., health, social care, care providers, police, housing, ambulance and fire services and volunteers) to support people to make their own decisions wherever possible and to assess mental capacity and make best interests decisions on their behalf as required.

The MCA in general applies to those aged 16 years and over, but it is of note that some provisions are reserved for those aged 18 years and above e.g. the making of a Lasting Power of Attorney, the ability to act as someone's Attorney, the ability to make an Advance Decision to Refuse Treatment and the Deprivation of Liberty Safeguards (DoLS).

The DoLS were introduced, as an amendment to the MCA, on the 1 April 2009. In short, they provide lawful authority to detain people in care homes and hospitals for the purpose of providing necessary care and treatment in their best interests. Please note that the DoLS do not authorise the care and treatment that is subject to either the person's consent or through applying the MCA.

As previously stated, the aim of this guidance is to support staff to assess mental capacity and make best interest(s) decisions within the parameters of the MCA and MCA code. It was produced by Waltham Forest's MCA Subgroup in collaboration with front-line practitioners and voluntary organisations.

Explanations of terms and definitions:

ADRT or Advance Decision to Refuse Treatment	A refusal of a treatment that may be required in the future, made by someone who had mental capacity to make that decision at the time the decision was made. The ADRT is legally binding if it is valid and applicable.
Advance Statement	This is a statement of wishes, preferences, values and beliefs. It is not legally binding but should be considered when making a best-interests decision for someone who lacks capacity to make that decision for themselves.
Court Appointed Deputies	Individuals appointed by the Court of Protection to act on behalf of adults who lack capacity and make decisions on their behalf about health and welfare and/or property and finance.
Human Rights Act 1998	The act sets out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic law.
IMCA or Independent Mental Capacity Advocates	Independent Mental Capacity Advocates were introduced as part of the MCA. This gives people who lack capacity to make certain decisions for themselves, the right to receive independent support and representation. Please see the MCA Code for full details on when an IMCA might be required.
Lasting Power of Attorney (LPA)	This allows an adult to appoint a person(s) to make decisions on their behalf in case they lack capacity to make a decision for themselves at some time in the future. There are **two** types of LPAs: 1. Health and Welfare 2. Property and Financial Affairs
Life-sustaining Treatment	This is any medical intervention, technology, procedure, or medication which a person providing healthcare regards as necessary at the time in question to sustain life.
SAR or Safeguarding Adult Review	This is a multi-agency process that considers whether serious harm experienced by an adult, or group of adults at risk of abuse or neglect, could have been predicted or prevented. The process identifies learning that enables the partnership to improve services and prevent abuse and neglect in the future.

Mental capacity: some key issues to consider

Mental capacity assessments are decision specific. When it is simply determined, e.g. 'Mental capacity assessed and George lacks capacity,' this phrase - in law - is meaningless. The question is: 'What is the actual decision(s) in hand'? If the question is not defined with specific precision before the assessment of mental capacity is undertaken, the exercise will be pointless.

The MCA sets out five core principles which must be followed:

1. A person must be assumed to have capacity unless it is established that he or she lacks capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he or she makes a decision that others believe to be unwise.
4. An act done or decision made, for or on behalf of a person who lacks capacity must be done so, or made in his or her best interests.
5. Before such an act is done, or decision 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.

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.

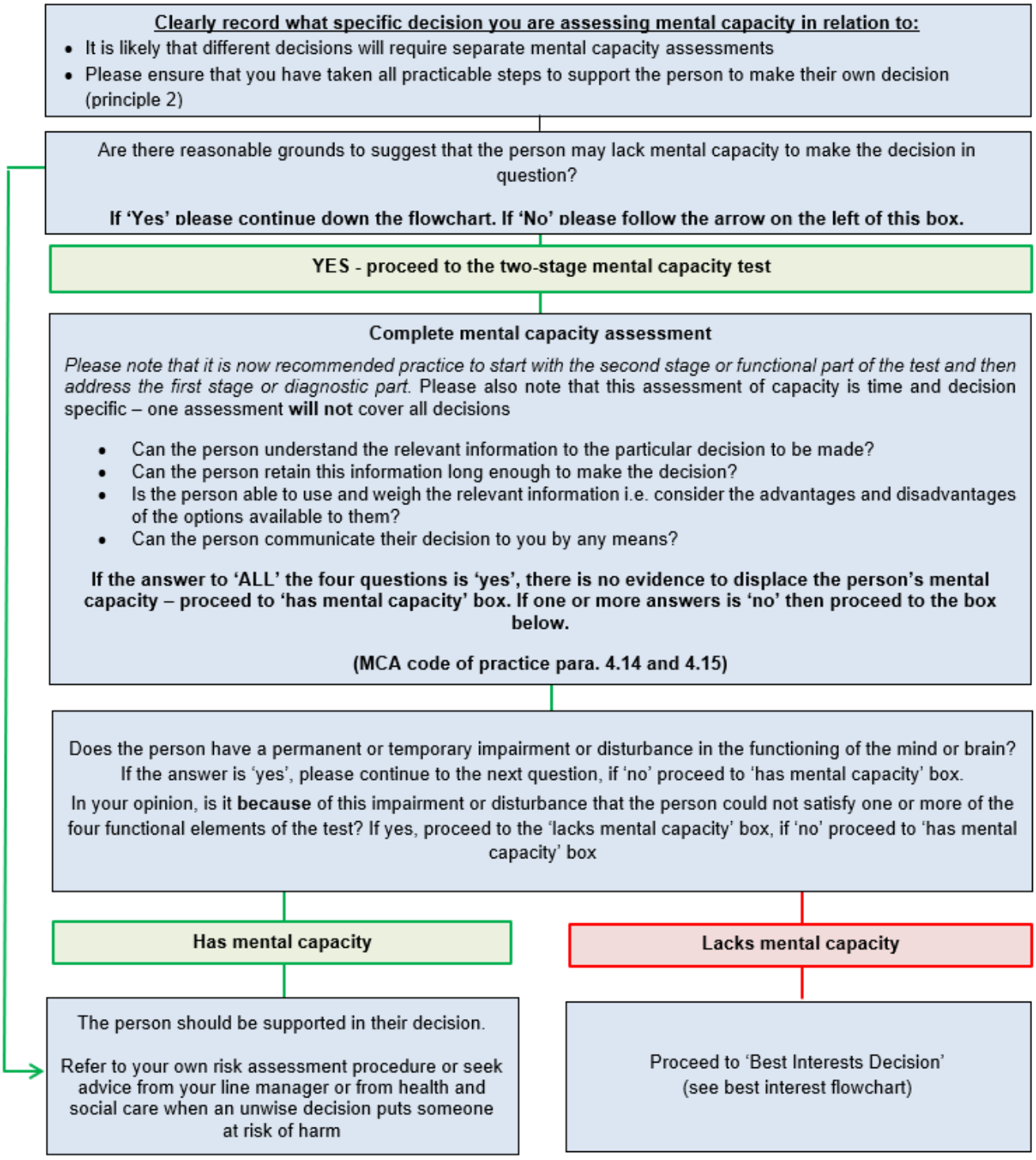
Carrying out a mental capacity assessment on someone is not neutral. The assessment process itself can often be seen as intrusive to the individual and can interfere with their right 'to respect for private and family life' (under Article 8 Human Rights Act). Therefore, you must always have grounds to 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 shared 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.

Mental capacity assessment flowchart (a)

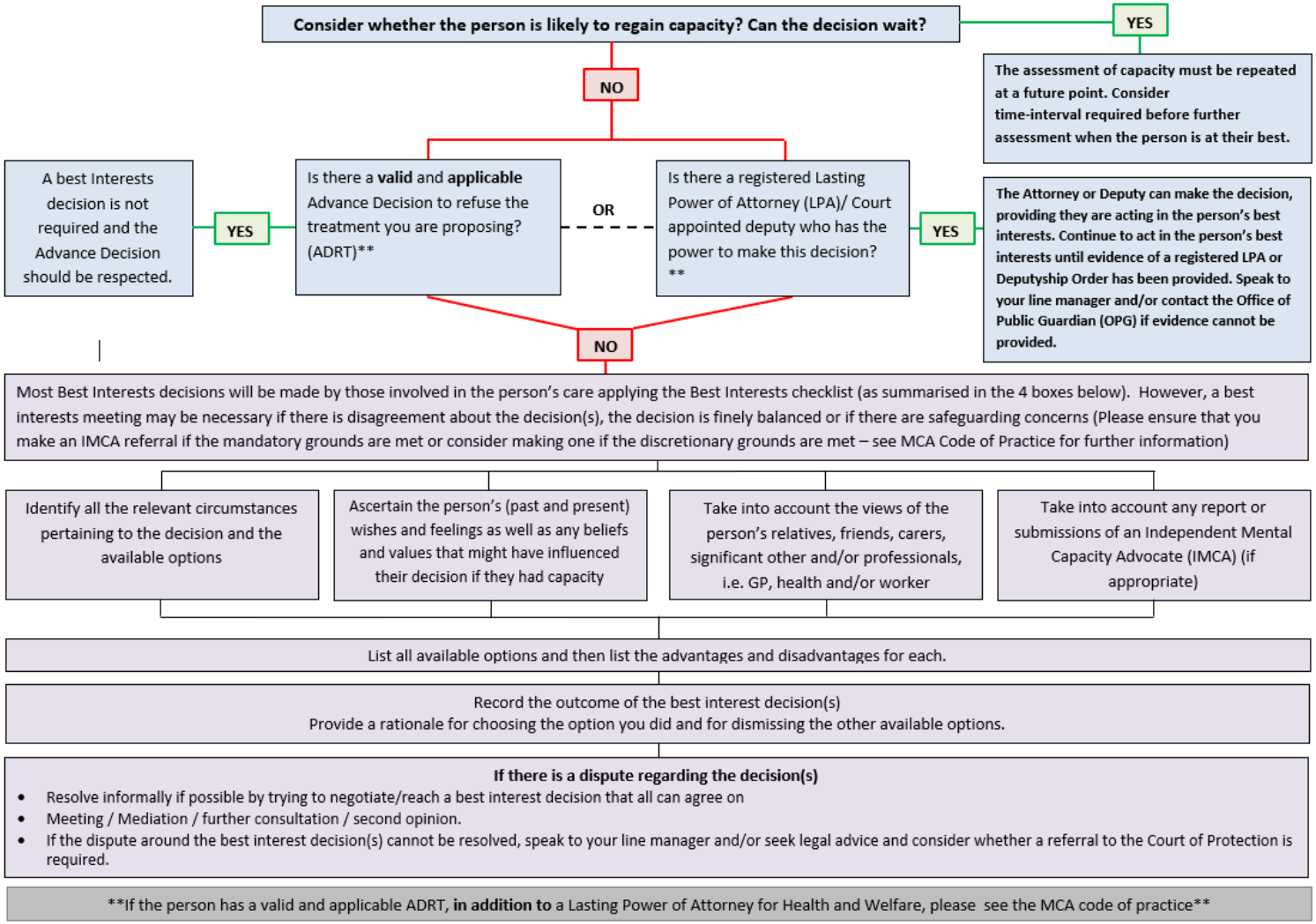
Principle 1 of the MCA is the presumption of mental capacity. However, if a person's mental capacity to make a decision is in doubt, professionals **MUST** apply the Mental Capacity Act 2005 (MCA).
The ethos of the MCA, along with all effective Human Rights-based practice, is to work with people and empower where possible, rather than do things for people. This flowchart provides practical steps to support people to assess mental capacity. It is not intended to be definitive guidance - please refer to your own organisation's MCA Policy and Procedures, as well as the MCA Code of Practice for further information.



Clearly document details of your conversation with the person to evidence how you reached your decision.

Following this, if the person is found to have mental capacity to make this decision, best interest is not required.

Best interests decision flowchart (b)



Additional information that may be useful to look at alongside this:
A guide to thresholds & practice for working with people (walthamforest.gov.uk)

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.

Fluctuating mental capacity refers to situations where a person’s decision-making ability varies. The person may lack capacity at the time of one assessment, but the result may be different if a second assessment is undertaken during a lucid interval. There are many different conditions where fluctuating capacity may occur for example, as a result of mental illness, dementia or an acquired brain injury. 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 of the day. This must be considered when supporting them to make a specific decision or assessing their mental capacity.

Key points to consider when working with someone identified as presenting with fluctuating mental capacity:

- The MCA code advises that professionals should delay an assessment if possible until the person might have regained capacity. However, if you can’t delay the assessment/decision then you should take the minimum action possible.
- The courts and NICE guideline have advised taking a long-term perspective on someone’s mental capacity rather than simply assessing the capacity at one point in time.
- If the patient is able to make the decision ‘you should record the person’s decision… and why you consider that the person had capacity to make it’
- Advanced Planning: Depending upon the context, you should also record what the person would want in the event that they lose mental capacity in future to make similar decisions, this will be incorporated in best interest decision-making.
- If the reality is that there are only limited periods during the course of each day or week that the person is able to take their own decisions, then it will usually be appropriate to proceed on the basis that, in fact, they lack capacity to do so. This is in the context where the consequences for the person are serious. But capacity status must be kept under review.
- In cases of genuine fluctuating capacity and significant risk/consequences an application to the CoP should be considered.

Executive capacity

Executive capacity can affect decision-making capacity. It is often overlooked, resulting in potential exposure of a vulnerable person to risk.

'The concept of 'executive capacity' is relevant where the individual has addictive or compulsive behaviours. This highlights the importance of considering the individual's ability to put a decision into effect (executive capacity) in addition to their ability to make a decision (decisional capacity).'

It can be difficult to assess the effect of executive impairment on mental capacity for a number of reasons - repeated assessment of capacity, supported by collateral information and real-life functional assessment are recommended.

If you have concerns that a person's executive functioning may be affecting their decision-making capacity, it is probably worth seeking a specialist opinion from a psychiatrist or psychologist.

Further points to consider around executive capacity:

- Collateral information should be sought from clinicians who have conducted functional assessments and family members.
- In the same way, MCA assessors should check the veracity of an individual's self-report by ensuring that it is congruent with their performance in everyday life.
- This more longitudinal and holistic assessment of capacity is essential in detecting the more subtle effects of executive impairment on decision making. It is clear however that this approach does not sit neatly with the very distinct legal definition of a determination of capacity being decision and time specific, highlighting one of the difficulties with the current legal standards (George and Gilbert, 2018)

General considerations: re-assess and take a more holistic approach

Mental capacity law emphasises the need to balance paternalism (protecting a person who lacks capacity from harm) against autonomy (allowing the person to make their own decisions) wherever possible.

In these particular cases, it is good practice to regularly reassess mental capacity to ensure that a person has the opportunity to learn and grow despite the effects of their executive impairment. With the benefit of additional practicable steps (Principle 2 of the Mental Capacity Act) the person may well be able to improve their decision-making capacity. Also, repeated assessment help to get a better sense of any repeated mismatch between the person's words and actions. Although there is no case that is determinative of this point, Essex Chambers guidance states that:

- You can legitimately conclude that a person lacks mental capacity to make a decision if they cannot understand or 'use and weigh' the fact that they cannot implement in practice what they say in assessment they will do.

However:

- You can only reach such a finding where there is clearly documented evidence of repeated mismatch. This means, in consequence, that it is very unlikely ever to be right to reach a conclusion that the person lacked mental capacity for this reason on the basis of one assessment alone. The application of this professional curiosity is fundamental in situations where executive functioning is questioned (Allen, 2019).

How to establish consent?

Consent is a person's agreement to someone - e.g. a volunteer, carer, health and / or social care professional - to provide support, care or treatment. People may indicate consent non-verbally (for example by presenting their arm for their pulse or blood pressure to be taken), verbally, or in writing.

For the consent to be valid, the service user must:

- **Be competent and have the mental capacity to make the particular decision**
- Have received sufficient information to inform the decision they are making
- The person must not be acting under duress of others

If there is any indication that the person lacks mental capacity to give informed consent, a mental capacity assessment must be conducted. Please refer to the Assessment of Mental Capacity flowchart with regards to this process.

Detailed information regarding consent in links below:

Consent to treatment for children and young people	People aged sixteen or over are entitled to consent to their own treatment. This can only be overruled in exceptional circumstances. Like adults, young people (aged sixteen or seventeen) are presumed to have sufficient capacity to decide on their own medical treatment, unless there's considerable evidence to suggest otherwise.
Consent to treatment	Consent to treatment means a person must give permission before they receive any type of medical treatment, test or examination. This must be done on the basis of an explanation by a clinician. Consent from a patient is needed regardless of the procedure, whether it is a physical examination or something else.
Consent to treatment – assessing capacity	All adults are presumed to have sufficient capacity to decide on their own medical treatment, unless there's considerable evidence to suggest otherwise.

Recording and documentation for professionals

Simple Decisions: It is required practice to make reference to Mental Capacity/Best Interests in care records even for simple everyday care decisions, although detailed recording is not usually expected.

Intermediate or Complex Decisions: More formal documentation is necessary. Recording for these decisions is required to be more in-depth and demonstrate how a particular conclusion was reached during the mental capacity assessment, as well as best interests considerations as outlined in the 'Best Interests' checklist. A balance sheet approach towards analysing the available options is also helpful i.e. listing the available options and highlighting the pros and cons of each to help reach the decision as to what is in individual's best interests. All partners signed up to pan-London data-sharing agreement.

Safeguarding and mental capacity

In situations where a young person (16+) or adult who has care and support needs is actually, or potentially, at risk of harm/abuse the Local Authority has a statutory duty under the Care Act 2014 to offer to safeguard the person.

If there is some concern that the adult may lack mental capacity with regard to any decision(s) that needs to be made throughout the Safeguarding process, then the MCA must be applied as highlighted throughout this document i.e. the adult's mental capacity should be assessed and the best interests decision-making process followed.

In terms of advocacy, if the Local Authority feel that the adult would have 'substantial difficulty' participating in the Safeguarding process, and does not have an appropriate person (other than a paid professional) to support them, then the adult has a right to an advocate under the Care Act 2014.

Alternatively, there are discretionary powers for the Local Authority or NHS provider to instruct an Independent Mental Capacity Advocate (IMCA) for the purpose of decision(s) around the safeguarding process or any measures/services that might be offered to protect the adult. This might include significant matters such as a change of accommodation or contact with a family member or friend.

It is of note that an IMCA can be instructed under Safeguarding even if the adult has family or friends who are involved in their life if it is thought that this would be of benefit to the person.

In terms of Safeguarding, the MCA also created two criminal offences of ill-treatment and wilful neglect of someone who lacks capacity in relation to at least some aspects of their care provision. These offences can be committed by anyone responsible for the person's care and support (paid and informal carers) and can result in a custodial sentence in some instances.

If you have safeguarding concerns for adults or children, please contact the London Borough of Waltham Forest (LBWF) safeguarding team or children social care to report any safeguarding concern, or if advice and support is required.

What to do if you have concerns:

If you have safeguarding concerns for adults or children, please contact London Borough of Waltham Forest (LBWF) safeguarding team or children's social care to report any safeguarding concerns, or if advice and support is required:

Concerned about an adult?

Phone: 020 8496 3000 (at any time)

Email:
WFDliaison@walthamforest.gov.uk

Website:
https://www.walthamforest.gov.uk/content/what-do-if-you-are-worried-about-vulnerable-adult

Concerned about a child?

Phone: 020 8496 2310

Email:
MASHrequests@walthamforest.gov.uk

(Monday to Thursday 9am to 5.15pm, Friday 9am to 5pm) or 020 8496 3000 (out of hours)

A social worker from our Multi Agency Safeguarding Hub (MASH) will speak to you.

Considerations on the wider context of care provision

The person is at the centre of their care and support

- The person's views and wishes must always be valued and where appropriate in line with 'Making Safeguarding Personal'
- The person should be informed of every step of the process
- Listen to them and work towards the outcome they want

Don't walk away – walk alongside

- People who have a cognitive impairment may find it difficult to engage with agencies – continue to support, and take time to build a trusting relationship
- Present the information on the basis of their understanding when discussing the decision you need them to make. It is not necessary that the person understands every element of what is being explained to him. What is important is that the person can understand the 'salient' factors
- If the person has mental capacity, do not judge them when they make an 'unwise decision.' The key to a successful assessment is patience and empathy
- Work with them, provide and empower them to help themselves when possible
- Always apply the least restrictive option in the person's best interest

Multi-agency approach

- Include other agencies and organisations. Who else is involved? Who needs to be involved?
- What information is held by others and/or is required?
- Be guided by "A Guide To Thresholds and Practice for Working With Adults, Carers and Families in Waltham Forest," as well as guidance on "Team Around the Person"
- Be guided by the "Self-Neglect Guidance" document
- Work collaboratively to share risk with your colleagues from across the partnership

Think family

- What impact is the person's behaviour having on the people around them?
- What impact are the other people in the family having on the person
- Is there anyone else at risk i.e. in a domestic abuse or elder abuse situation?
- Does the person have a statutory right to advocacy?

Think family, think community and wider than statutory services

- Engage the community, friends and family
- With informed consent (where that can be obtained) speak to neighbours or anyone else the individual may interact with
- Are there any voluntary/community organisations who could offer support?

Build trust

- Form a relationship, start conversations to get to know the person rather than immediately focus on the issues;
- Keep communication consistent
- Provide reassurance: the person may fear losing control. It is important to allay such fears.
- Agree to small steps
- If the person is known to have fluctuating mental capacity, please plan for a time to have a discussion with the person at their least impaired and make best interest decisions at a time when the person lacks mental capacity to make a decision(s)

Build trust

- Understand the person's background – incorporating their wishes
- Always treat the person with respect and dignity
- Be non-judgemental and anti-discriminatory

Mental capacity case studies

Mental capacity and self-neglect: George	Hospital discharge(for continuing health care): Mr. R	Making end-of-life decision: Geraldine
Faith-based advance decision: Marie	Medical after care: Murat	After care where dementia present: Patricia
Mental capacity in relation to taking medicine: Raymond	Mental capacity where learning disability present: Aisha	Cared-for person's right to make decisions: Sabrina
Advocacy in medical after care: Rosemary	Mental capacity advocacy: Ms. A	Self-neglect and pressure care: ZZ

Mental capacity resources:

Age UK	SCIE MCA website	National MCA Forum
Mental Capacity Law and Policy	Essex Chambers resource on Mental Capacity law	National Autistic Society
Alzheimer's Society	Office of the Public Guardian	Independent mental capacity advocate service

Further reading on mental capacity:

Mental Capacity 2005	Mental Capacity Act Code of Practice	Care Act 2014
London Multi-Agency Adult Safeguarding Policy and Procedure (2016)	Mental Capacity in Waltham Forest webpage	Making Safeguarding Personal (2014 Guide)
Self-Neglect Multi-Agency Guidance	DOLS Code of Practice	