

Reflections on the Mental Capacity Act 2005 in urgent and short-term decision- making situations


Practice Guidance

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Reflections on the Mental Capacity Act 2005 in urgent and short-term decision-making situations

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Mental Capacity Act 2005 Code of Practice is accessible here:

<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

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Introduction and purpose.

This internal guidance is aimed at supporting practitioners in Central Bedfordshire Council that work with people, aged 16 years and over, that may lack the mental capacity to make a particular urgent or short-term decision.

This is specifically helpful in situations that are crisis intervention in nature, where a decision is immediately required to prevent harm to a person, and the decision is going to be short-term, and time limited with a follow up assessment completed swiftly.

The starting place – tailored to the decision and circumstances.

It is a legal requirement that evidence of Mental Capacity Act Assessments and Best Interests decisions are recorded, however there is no legal requirement to use any particular form or paperwork. The MCA 2005 has this flexibility so that the same 'test of capacity' (section 2 and 3 of the Act) and Principles (Section 1 of the Act) can be applied across all types of decisions/situations in a tailored and proportionate way.

The MCA 2005 Code of Practice explains that professionals are normally expected to undertake a fuller assessment, reflecting their higher degree of knowledge and experience compared with family members or other carers who have no formal qualifications (Para 4.45). The MCA 2005 Code of Practice adds that it is good practice for professionals to carry out a 'proper assessment of a person's capacity to make particular decisions and to record the findings in the relevant professional records' (para 4.61) and apply the principles of the Mental Capacity Act (Para 4.64).

The MCA 2005 Code of Practice provides indications of when an assessment of Capacity or Best Interests might be completed and recorded with less detail than would be hoped in situations that require **urgency** and well as **complexity/significance**.

It is these matters that assessors should consider and refer to when deciding the extent and nature of their Mental Capacity Assessment and Best Interests assessment. The further a practitioner goes away from a detailed and robust analysis the greater justification needed in terms of urgency and or reduced **complexity/significance** of the matter at hand. When deciding what is reasonable a practitioner should consider the following:

1. The steps that are 'reasonable' will depend on 'individual circumstances and the **urgency of the decision**' (MCA Code of Practice, Para 4.45).
(NB: Emphasis added).
2. NICE guidelines (2018) explain that:
3. While the process [of Mental Capacity Assessment and Best Interests decision-making] applies to all decisions that fall within the scope of the Mental Capacity Act 2005, both large and small, the nature of the assessment and the recording of it should be **proportionate to the complexity and significance** of that decision

The starting expectation of a professional:

The assessment of capacity being the most thorough and detailed assessment possible with a full and robust record created regardless of the situation. However, if the circumstances make this difficult the assessor must consider the nature and recording of their assessment being proportionate the urgency, complexity and or significance of the situation and decision at hand. The rationale being clearly recorded in the relevant records/assessment documentation and the practitioner being able to defend that decision if required.

Where assessments are impacted by the urgency of the situation, it might be helpful to consider this list of factors:

1. The starting assumption must be that the person has the capacity to make specific decisions. If, however, anyone thinks a person lacks capacity, it is important to then ask the following questions:
 - a. Does the person have all the relevant information they need to make the decision?
 - b. If they are making a decision that involves choosing between alternatives, do they have information on all the different options?
 - c. Would the person have a better understanding if information was explained or presented in another way?
 - d. Are there times of day when a person's understanding is better?
 - e. Are there locations where they may feel more at ease?
 - f. Can the decision be put off until the circumstances are different, and the person concerned may be able to make the decision?
 - g. Can anyone else help the person to make choices or express a view (for example, a family member or carer, an advocate or someone to help with communication)?
 - h. Does the person understand what decision they need to make and why they need to make it?
 - i. Can they understand information about the decision?
 - j. Can they retain it, use it and weigh it to make the decision?
 - k. Be aware that the fact that a person agrees with you or assents to what is proposed does not necessarily mean that they have capacity to make the decision?
 - l. Does the record evidence where the inability is in terms of the functional test and the reasonable belief that this is because of an impairment or disturbance in the person's brain or mind.

NB: These are adapted from paragraphs 4.45 and 4.46 of the MCA code of Practice

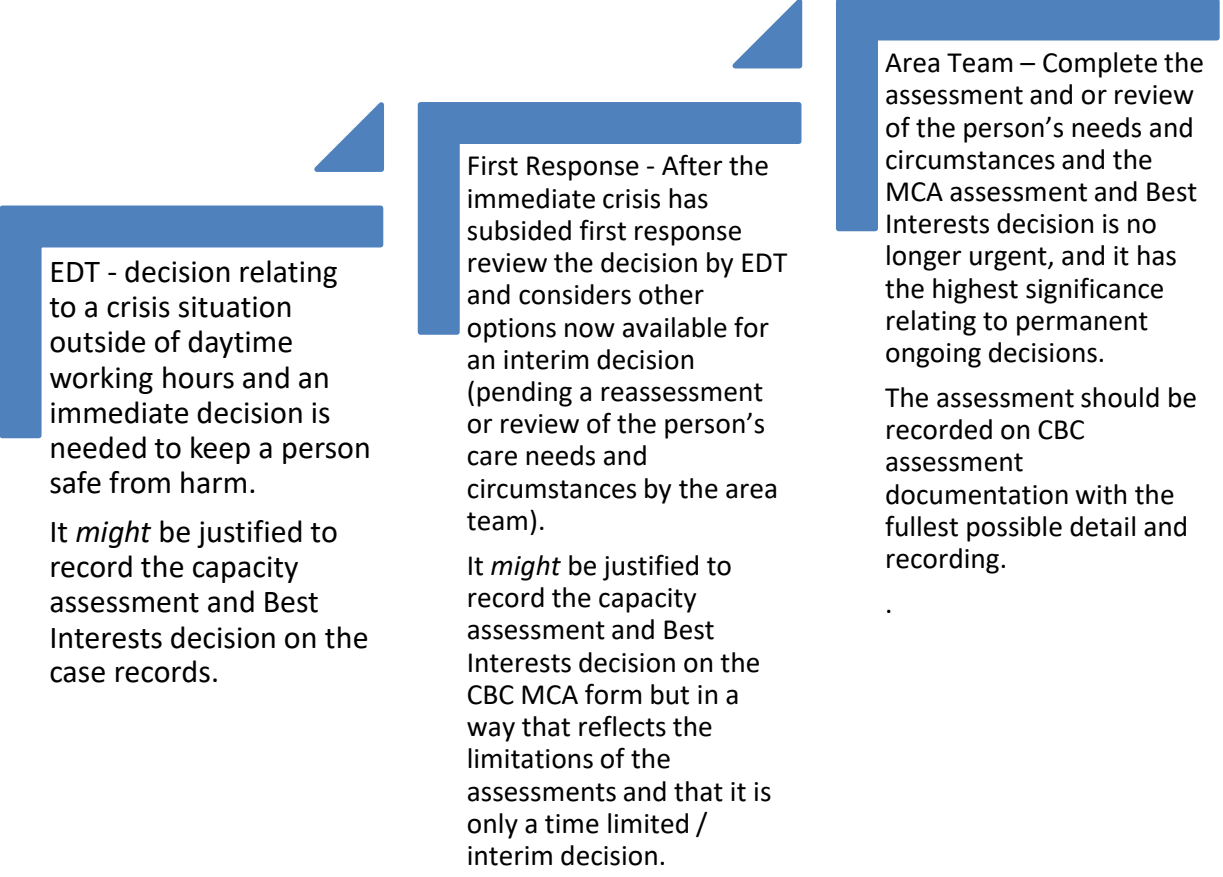
Where assessments are completed with pressures of urgency, and might be limited because of this, is the assessment and or subsequent decisions time limited as possible? Is there a clear agreement on how and when this will be reviewed in more detail and reversed where appropriate? Are the basics of the MCA 2005 evidenced in case records and limitations explained fully so that they can be given to the next assessor following the situation up.

Further Capacity and Best Interests Decisions that are built on the previous assessment.

Assessments of a person that moves through a situation that starts in crisis and or high risk but moves through the systems of support may have various assessments that build upon one another and are added to as the levels of urgency or significance changes.

For example, a decision made responding to an immediate concern of harm involving EDT at 1am in the morning might justify a different degree of assessment and recording than what should take place the following day by the day team. Similarly, the significance of an initial decision made by first response, to keep someone immediately safe (short term and urgent) might have less significance than a later decision made by the area team on where to reside permanently. These assessments should be considered as building on one another.

A way of illustrating this might be to think of steps of assessment – the less urgent it becomes (the further away from crisis intervention) the greater expectation of a detailed assessment. The more long-term the decision at hand the more significant the decision might be for the person.



EDT - decision relating to a crisis situation outside of daytime working hours and an immediate decision is needed to keep a person safe from harm.

It *might* be justified to record the capacity assessment and Best Interests decision on the case records.

First Response - After the immediate crisis has subsided first response review the decision by EDT and considers other options now available for an interim decision (pending a reassessment or review of the person's care needs and circumstances by the area team).

It *might* be justified to record the capacity assessment and Best Interests decision on the CBC MCA form but in a way that reflects the limitations of the assessments and that it is only a time limited / interim decision.

Area Team – Complete the assessment and or review of the person's needs and circumstances and the MCA assessment and Best Interests decision is no longer urgent, and it has the highest significance relating to permanent ongoing decisions.

The assessment should be recorded on CBC assessment documentation with the fullest possible detail and recording.

The above should not be taken as a definitive rule. It simply illustrates how assessments of Mental Capacity and Best Interests might need to build on previous assessments, and that there will be a greater expectation of detail in the assessment and recording as a decision/situation becomes less crisis intervention (less urgent) and more permanent (more significant).

It is important to note that such decisions are operational decisions in the relevant teams as well as subject to the circumstances at hand.

Closing:

The starting expectation is that all Mental Capacity and Best Interests assessments allow for robust recording of the MCA 2005 and case law considerations. This guidance advocates for a starting place of excellence.

Nevertheless, this guidance has been created to reflect that there will be situations where the assessment of Mental Capacity and Best Interests is restricted or limited due to circumstances faced by the practitioner.

In such situations the recording of the assessments should refer to the reasons why an assessment might be limited, and appropriate justification being outlined in terms of the concrete circumstances at hand. Where decisions and or recording is limited there is an absolute necessity for the assessment or associated decisions to be time limited - and this to be detailed in the

assessment with the arrangement of when and who will follow this up and review the ongoing assessment and decisions.

Case Scenario

EDT -

On a Saturday a care agency or informal carer contacts EDT about circumstances which mean that they are unable to provide care that they ordinarily carry out for a person with eligible care and support significant needs.

EDT obtains details of the person's care needs and seeks to establish the available options. Through initial enquiries there is reason to cause doubt about the person's mental capacity (ability) to decide between the options identified and the person needs urgent care that evening.

The situation is considered as needing an immediate decision and is of high urgency because without a decision being made on her care needs there is a high likelihood of serious harm.

There is a need to record a determination of mental capacity and, if assessed as lacking capacity, a best interests decision between available options. This situation would likely warrant the assessment and recording to be proportionate to the situation.

The EDT worker considers the MCA 2005 requirements and records the assessment of capacity and best interests decision within their EDT documentation (if agreed by their operational managers) in their usual way. The records show that Best Interests decision is very time limited to reflect that this was an emergency and that the capacity assessment and best interests assessment has been limited in nature and recording. There is a recorded expectation that the situation, capacity and best interests decision, is reviewed the following day by First Response Team at which point this initial Capacity Assessment and Best Interests decision can be built upon.

First Response -

The First Response worker reviews the situation the following day but, because the immediate emergency has been dealt with, there is now a greater expectation in terms of the nature and recording of the capacity assessment. The first response worker reconsiders with the person and involved network what options are available as this may have changed during traditional working hours. Considerations are made around whether the person can be supported more to understand their situation and the options available? A visit to the care home might take place and the reasons for the care breakdown explored in more detail. The first response worker identifies that a review of the care and supports needs is required, as well as an assessment by the person's GP. The carer has also said that they need a break to consider if they are willing and able to continue.

The First response worker has a lot more details now available and the emergency has been dealt with. The First Response worker uses the CBC MCA Forms but, because the decision at hand is very short-term pending more detail on the person's care needs and options, they complete the CBC MCA assessment proportionate to the complexity and significance. There is no option at present to return home with the level of care they require, and the decision is only for a short period. The person, although lacking capacity to consent, is expressing that they are happy at the placement and not objecting.

Area Team -

The Area Social Care Team uses the time to complete a reassessment of her and support care needs and thorough exploration of the longer-term options. The capacity assessment is no longer

urgent, and the decisions have become more significant, being a longer-term decision in nature as well as more complex because of the range of available. The assessment of capacity and recording has no need to provide justification of proportionality – the situation is significant and long term/serious in nature and is also not urgent. The assessment should be recorded on CBC assessment documentation with the fullest possible detail and recording.