

# The Mental Capacity Act: unwise choices

*N&SCS provider forum 12<sup>th</sup> April 2022*

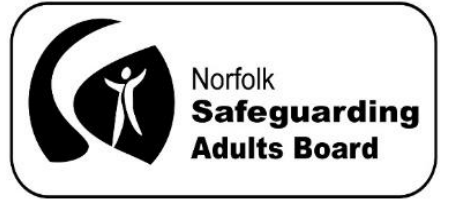
---

*Becky Booth  
Deputy Manager  
Norfolk Safeguarding Adults Board*

# Key MCA principles..

Presume Capacity	Most people can make some decisions
Make every effort	Make every effort to help and support the person to make the decision - think about the information they need to have, the way that information is presented or talked through
<b>Unwise choices</b>	Remember that adults have the right to make decisions that may be seen by others as unwise – you may not agree with their decision, but this does not make it the wrong one for them
Best Interests	If someone else has to make a decision on behalf of an adult assessed as lacking capacity, their best interests must be considered
Least restrictive	Any decision made must be the least restrictive option, with as little impact as possible on the person's rights and freedoms

# Unwise choices



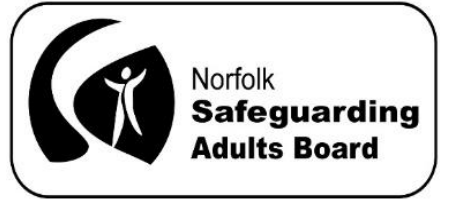
The actual wording in the legislation is:

A person is not to be treated as unable to make a decision merely because he makes an unwise decision

In practice this is translated in a number of ways, and in particular to explain why people / agencies may not intervene where there are concerns about risk

But the key word here is **merely**

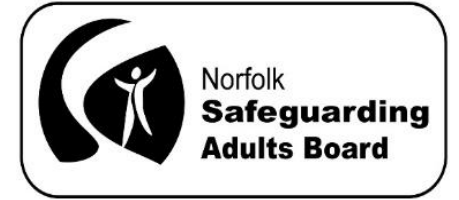
# Unwise choices



...so the point being made in the Act is that someone would not **automatically lack capacity** simply on another person's judgement of their decisions - taking risks, for example

...not quite the same as 'having a right to make unwise choices' – which suggests a subtext of 'we can't intervene'

# New draft MCA code of practice



Published for consultation March 2022 - additional guidance around the first principle emphasises that **assuming capacity** should not be used as a reason for **not assessing capacity**

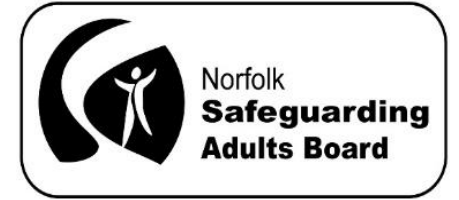
Also distinguishes between **considering** and assessing capacity - considering a person's capacity means asking whether there is a **proper reason to doubt** that the person has the capacity to make the decision in question – if, so an assessment is needed

This may also be necessary if the person is proposing to take a decision that is **unwise or significantly out of character**.

Failure to consider this can be just as harmful for the person as an overly hasty decision that they lack the relevant capacity

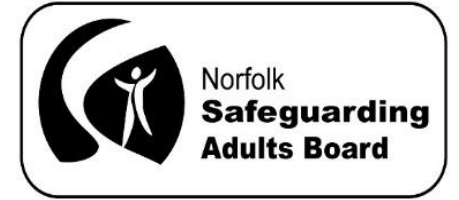
(based on [Guide to the draft MCA code of practice - Community Care](#))

# Unwise choices



- When we say 'unwise', do we also judge? Do we think 'bad'?
- Why might we think this?
- Does this affect how we think about what the person is doing, and therefore our own responses?

# Professional curiosity

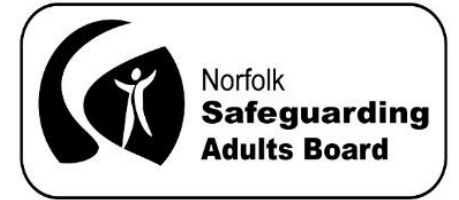


We have a duty of care – we should be asking **why** is the person making that choice?

- Think about the **context** for the person – what sits behind the decision – past history / trauma, addiction, compulsion, mistrust
- Does the person really have all the **relevant information**?
- Do they have a more than one realistic option i.e. **actual choice** – from their perspective?

E.g. someone refuses a shower – they may used to baths / strip washing / don't like water on their face / very private

# Executive capacity



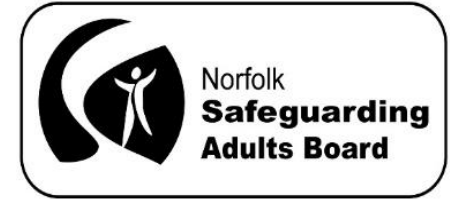
Where a person appears able to make a decision but not able to act on it.

The new code says that if a person cannot understand that **they are not carrying out the action** from the decision, and **there is evidence this happens repeatedly**, it can be said that they lack capacity to make the decision

e.g. supporting someone with a mild learning disability with financial safety – the person may have been assessed to have capacity to manage their spending money, understand the risks from a friend who keeps asking them to lend money, and have a plan to reduce the risk - but then 3 consecutive times when actually out with the friend they are unable to resist giving that friend money, and tell you they ‘just didn’t think’ in the moment



# Support to minimise risk



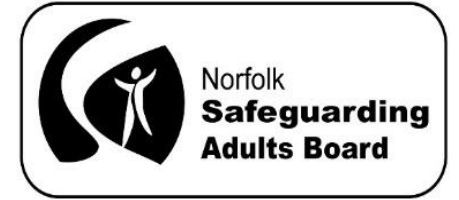
SAR Joanna, Jon and Ben: CPAP machines were not being regularly used, weight and diet poorly managed; said to be their choice – but these were contributory to Joanna and Ben’s deaths, which were felt to be preventable

Responsibility remains with us to make an effort to support people to make better choices or involve others to minimise the risk (depending on the **risk involved** – needs clear assessment in order to plan management)

Food choices – someone in receipt of care may be diabetic but said to be able to choose to eat very sugary foods – how might risk be mitigated?

We can still work and support best interests, even if we cannot impose them

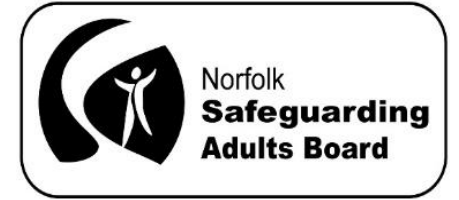
# Responses to unwise choice



- Don't give up, or walk away...
- Support positive risk-taking – making safeguarding personal
- Help others to understand (e.g. relatives, neighbours, members of the public, other colleagues, ambulance crews)
- Review, monitor, support, review – things change!
- Be clear about actual impact of the choice / risk
- Think about the ways you may still be able to minimise that risk
- Record rationale for any decisions made by the person or the people supporting them

What unwise choices have YOU had to consider or manage with the people you support?

# More information..



- Have a look at the new code of practice:  
[Changes to the MCA Code of Practice and implementation of the LPS - GOV.UK](#)
- Visit NSAB website for more information and useful links  
[Mental capacity & safeguarding | Norfolk Safeguarding Adults Board](#)
- Sign up for MCA training via St Thomas  
[Norfolk County Council training \(stthomasttraining.co.uk\)](#)