

INFORMATION SHEET

Making It Happen: Positively managing risk for children and adults with severe learning disabilities

Mental Capacity Act 2005

Thank you to Doughty Street Chambers for their help with this resource. The following individuals contributed to this resource:

Caragh Nimmo

Sophy Miles

Introduction

Summary information about the Mental Capacity Act 2005 and how it is relevant to positively managing risk for children and adults with severe learning disabilities during Covid 19.

All our information sheets are available to download free of charge.

To enable us to continue our work [please support us](#) or donate £3 by texting CBF to 70450.

Is this resource helpful? Please spend a few minutes giving us some feedback: www.surveymonkey.co.uk/r/cbfresources

Summary

The [Mental Capacity Act 2005](#) explains how to assess whether a person has capacity to make a decision and if not, how the decision should be made for them. Any act done or decision made for a person lacking capacity must be one which is in their best interests.

Sometimes people involved in the care of a person who lacks capacity can have different opinions about what would be in their best interests. It may be possible to resolve these disagreements informally. However if that is not possible then the Court of Protection can be asked to decide what decision is in the best interests of the person.

Key Points

The Mental Capacity Act 2005 continues to apply during the Covid-19 pandemic. The key provisions in the Mental Capacity Act 2005 (MCA) relevant to whether a person lacks capacity and, if they do, what would be in their best interests are sections 1, 2, 3, and 4.

Section 1 MCA contains the five guiding principles.

These principles should be kept in mind throughout. The principles are:

1. A person must be assumed to have capacity unless it is established that he lacks capacity.
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.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
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 which is less restrictive of the person's rights and freedom of action.

Section 2 of the MCA sets out the test for capacity.

It says that a person will lack capacity in relation to a particular matter if 'at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain'. This impairment may be the result of an illness or disability. It doesn't matter whether the

impairment is permanent or temporary as long as the result is the person is unable to make a decision to themselves about the matter at that particular time.

The test is time specific. That means it only matters whether a person has capacity at the time the decision has to be made. They could gain capacity to make that decision in the future.

The test is also decision specific. This means it only matters whether a person has capacity to make a particular decision. A person could have capacity to decide whether to go to the gym, but they might not have capacity to make decisions about their money because that decision involving understanding and weighing up different information and risks.

A person will not lack capacity just because of their age, appearance, a condition they have, or an aspect of their behaviour which might people to make assumptions about their capacity.

Section 3 of the MCA sets out more information about when a person will be unable to make a decision for themselves for the purpose of the capacity test in section 2.

It says a person lacks capacity to make a decision if they cannot do one of any of the following:

1. Understand the information relevant to the decision

What information is relevant to the decision will depend on what the particular decision is, but it will include information about the reasonably foreseeable consequences of deciding one way or another or of failing to make a decision.

The relevant information should be communicated to the person in a way which will best help them to understand it, for example using simple language or visual aids. If they understand the information presented to them in this way that is sufficient. They must understand the salient features of the information but need not understand all the information.

2. Retain the information relevant to the decision

The person only needs to be able to retain the information long enough to be able to use or weigh it to make the decision. Retention even for a short period is enough if they can do this.

3. Use or weigh the information relevant to the decision as part of the process of making the decision

This means the person must be able to think about and use the relevant information as part of reaching their decision.

4. Communicate their decision

The person may be able to communicate their decision by talking, using sign language or any other means. All practicable steps should be taken to help them to communicate their decision.

Section 4 of the MCA says a decision which should be made or an act which should be done for a person lacking capacity is the one which is in their 'best interests'.

A decision about what is in the person's best interests should not be based on assumptions about their age, appearance, condition or any aspect of their behaviour.

Section 4 sets out a checklist of steps that should be taken to work out what is in the best interests of the person lacking capacity. The decision-maker should consider all relevant circumstances and do the following:

1. Consider whether the person could in the future have capacity in relation to the matter, and if so whether the decision can wait until then;
2. Ensure participation of the person on whose behalf the decision is being made or act done if reasonably practicable;
3. Consider if possible the person's past and present wishes and feelings, their beliefs and values and other factors that would be likely to influence their decision;
4. Take into account the views of family members and those interested in the person's welfare, if it is practicable and appropriate to do so.

The decision maker may wish to keep a record of the information they took into account in reaching their decision to ensure they can justify their best interests decision if necessary.

Relevance

Making decisions under the MCA about accessing new activities or returning to activities during the Covid pandemic should follow a two stage process.

- 1. Does the person have capacity to make the decision about resuming or accessing the new activity?**

The first step is to identify the information relevant to the decision about whether to engage in the activity. This is likely to include the fact there may be a risk of contracting Covid from engaging in the activity. It may also include information about how to reduce those risks and that the activity may have to be done differently than usual to comply with Covid guidelines.

The person must be able to retain the information and use it to reach their decision. For example, if the decision is whether to go to the gym then the person should be able to weigh up the risks of contracting Covid against the benefits of going to the gym.

Finally, the person must be able to communicate their decision about engaging in the activity.

2. If the person lacks capacity, what would be in the person's best interests in terms of resuming or starting an activity?

If the person lacks capacity to decide whether to engage in the activity then a best interests decision needs to be made for them. It can be made by someone interested in their care such as a parent or carer. In other cases the relevant local authority may be the decision-maker.

The decision maker will need to consider each point in the section 4 checklist when deciding whether engaging in an activity is in the person's best interests. The "relevant circumstances" will include the risks to the person of engaging in the activity such as those arising from Covid.

In the example of going to the gym these risks could include the risk the person may not socially distance from other gym users, may not sanitise and may touch unclean surfaces. There may also be risks specific to the person lacking capacity, for example they may have an underlying health condition. The decision maker should balance these risks and the likelihood of them arising against the risks to the person of not engaging in the activity to decide what is in their best interests.

The decision maker should also consider possible ways of reducing or mitigating the risk to the person of engaging in the activity. For example, a support worker could attend the gym with the person, they could use the gym at off peak times and wipe down the gym machines.

Before making a decision, the decision maker should try to ensure the participation of the person lacking capacity in the decision making process. In some cases, an Independent Mental Capacity Advocate may be instructed by a local authority. They should also take into account views of family members and anyone else interested in the person's welfare.

Taking all this information into account, the decision maker should decide whether it is in the person's best interests to engage in the activity and if so, how best for them to do so .

If there are different ways of engaging in the activity which are all in the person's best interests, the decision maker should choose the option which is the least restrictive.

Deprivation of Liberty under the Mental Capacity Act 2005.

Some people with severe learning disabilities may require care which involves restrictions in order to keep the person safe. These could include:

- Being supervised when they go out;
- Having someone with them at all times;
- The door being locked;
- Decisions such as when to go out being taken by others.

The local authority which is funding or commissioning the person's care should consider whether the person is deprived of their liberty.

Article 5 of the European Convention on Human Rights states that a person who is "of unsound mind" (which includes people who lack capacity for the purpose of the MCA) can **only** be deprived of their liberty in accordance with a procedure prescribed by law. They must be able to challenge the lawfulness of their detention quickly.

The MCA provides two legal avenues for a person who lacks capacity to decide about their residence and care to be deprived of their liberty:

- The “Deprivation of Liberty Safeguards” or “DOLS”- only applicable for those who are over 18 and in a registered care home or a hospital. DOLS allows a local authority to grant standard or urgent “authorisation”, permitting the care home or hospital to care for the person concerned to deprive the person of their liberty where this is necessary and proportionate in the person’s best interests. Assessments are carried out before a standard authorisation can be granted. The authorisation could be subject to conditions which the care home must meet. These could require the care home to make sure that the person is offered access to facilities outside the care home such as parks, gyms, or shops. The person must have a “representative” (referred to as RPR) who supports and represents them.
- The Court of Protection can authorise the deprivation of liberty of someone who is deprived of their liberty but is between 16 and 18, or who is in a setting where DOLS doesn’t apply. This could be a supported living placement. The court can make the order under section 16 MCA. These orders will only be made if the local authority who applies has consulted with the person concerned and their families and has satisfied the court that the measures are necessary and proportionate. Again, the person must have a representative (referred to as a rule 1.2 representative).

The “least restrictive” principle still applies. The process of identifying whether it is in the person’s best interests to have access to an activity such as going to a gym is exactly the same. It may be even more important to someone who is subject to restrictions. If the activity is in the person’s best interests, the care home or the supported living placement should be asked to facilitate it.

In April 2022, the new “Liberty Protection Safeguards” will replace both DOLS and section 16 deprivations of liberty.

The British Institute of Human Rights has provided factsheets about Human Rights, Mental Health and Mental Capacity which you can find [here](#).

Remedies if things go wrong

Sometimes people involved with the care of the person lacking capacity disagree about what is in their best interests. They may also disagree about their capacity to take the decision.

Chapter 15 of the [Code of Practice](#) provides guidance as to how to address differences of opinion. These include asking for the assistance of an independent advocate or holding a meeting with all interested parties to try to reach a consensus. If informal remedies are unsuccessful, an application to the Court of Protection may be necessary.

The Court of Protection can decide whether the person has the mental capacity to make a particular decision for themselves. If the person lacks capacity, the Court of Protection can take decisions in the person's best interests. The Court of Protection's process is governed by the [Court of Protection Rules 2017](#) and [Practice Directions](#).

You can apply to the Court of Protection to make a declaration about whether a person has capacity or to make a best interests decision for a person lacking capacity. You need to apply to the Court of Protection for permission to bring the application. If the only issue in dispute is whether it is in the person's best interests to undertake a particular activity, it is possible permission would not be granted on the basis the decision is relatively minor; however this would depend on the impact on the person in question.

Where the application to the Court relates to the person's health or welfare, the Court will expect you to have taken reasonable steps to resolve the issue first. [See [PD 3B](#) and refer to the "pre-issue stage"].

Permission is not necessary to challenge an authorisation under DOLS in the Court of Protection. This is in order to protect the person's rights under Article 5.

You can find the necessary forms [here](#). However, you are recommended to take legal advice before making an application if possible. Legal aid is available for some applications to the Court of Protection depending on your means.

If the person wishes to challenge an authorisation under "DOLS", they are entitled to non-means tested legal aid. Their RPR is also entitled to non-means tested legal aid. Unfortunately, only means-tested legal aid is available for cases involving deprivation of liberty under section 16 MCA.

The Law Society has a list of solicitors with expertise in welfare cases in the Court of Protection. You can download the PDF of current Mental Capacity Accredited Members [here](#).

However, you should only make an application to the Court of Protection where it is necessary. If you make an application which the court decides was not necessary then you can be liable to pay the costs and court fees.

You make an application by completing an application form. A solicitor who specialises in Court of Protection work can help you to do this.

Further resources

UK Government Guidance, '*Mental Capacity Act Code of Practice*': click [here](#).

UK Government Guidance, '*The Mental Capacity Act (2005) and the deprivation of liberty safeguards (DoLS) during the coronavirus (COVID-19) pandemic*': click [here](#).

UK Government Guidance, '*The Mental Capacity Act (2005) and the deprivation of liberty safeguards (DoLS) during the coronavirus (COVID-19) pandemic: additional guidance*': click [here](#).

Social Care Institute for Excellence '*Best interests decisions: A COVID-19 quick guide*': click [here](#).

Alex Ruck Keene, Mental Capacity Law and Policy, '*Covid-19 and the MCA 2005*': click [here](#).

Social Care Institute for Excellence '*Mental Capacity Act: Independent Mental Capacity Advocate*', click [here](#).

British Institute of Human Rights: click [here](#).

Reviewed January 2021

© The Challenging Behaviour Foundation, 2021

The Challenging Behaviour Foundation

We are a registered UK charity specifically focussed on the needs of children, young people and adults with severe learning disabilities whose behaviour challenges, and their families. We will make a difference to the lives of people with severe learning disabilities, whose behaviour challenges, and their families by:

- Championing their rights
- Ensuring timely information and support
- Raising awareness and understanding
- Promoting and sharing best practice

To access our information and support, call 01634 838739, email info@theCBF.org.uk or visit our website: <https://www.challengingbehaviour.org.uk>