



MCA Guidance

Social Media

Quick Guide and links to support practitioners when
undertaking capacity assessments relating to
Social media decisions

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2	LSAB MCADOLS Subgroup		<ul style="list-style-type: none">• Disclaimer strengthened - not legal advice• The order of the MCA assessment• Source acknowledgment added re relevant information• Live links updated
3	MCA Task and Finish Group	May 2024	Changed to Information Sheet
4			
5			

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INFORMATION SHEET MENTAL CAPACITY ACT GUIDANCE DOCUMENTS:

SOCIAL MEDIA

This information sheet is intended to provide guidance to your Mental Capacity professional practice. Your scope of practice is the **limit of your knowledge, skills and experience** and as a health or social care professional, you must ensure that you work within this. Whilst your scope of practice is likely to change over time as your knowledge, skills and experience develop, any area of mental capacity assessment that falls outside of this, must be escalated via your line of authority to ensure adequate support and expertise is provided to both you as a practitioner and the assessment. **This guidance cannot take the place of legal advice, and please remember that interpretation of case law can change over time.** Workers should check for any significant changes to case law since this guidance has been written. In any case of doubt as to what to do, your legal department should be consulted.

Please read in conjunction with CONTACT information sheet where necessary.

Where the real issue is not so much the person's use of the internet to access contact or potentially make contact with people they do not otherwise know, but to make contact with a particular person or group of people then the test to apply (and the information relevant to that test) will be that for **Contact**

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Please see the below information and links which may help you when undertaking a capacity assessment around **SOCIAL MEDIA** decisions. Please note and pay particular attention to the relevant case law and what has now been determined by the courts as being relevant information to this decision. As with all MCA situations, the MCA Code of Practice is key guidance.

Those undertaking capacity assessments need to remember the importance **of applying Principle 2 of the Act.** Even if someone is assessed as lacking capacity to make a decision, their capacity could improve with additional support to understand the decision to be made. Whilst it is acknowledged that some decisions cannot wait and a determination on capacity and a best interests decision needs to be concluded, there may be some situations where, for example with time, additional information/education, the person could gain or regain capacity at a later date.

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This is particularly important when assessing capacity around life changing or personal decisions.

Section 1: The five statutory principles are

1. A person must be **assumed** to have capacity unless it is established that they lack 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 that is **less restrictive** of the person's rights and freedom of action.

Sections 2 and 3 define what is meant by lack of capacity

Section 2 MCA 2005 states that

(1) a person lacks capacity in relation to a 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 the brain

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

A lack of capacity cannot be established merely by reference to—

- (a) a person's age or appearance, or
- (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

Section 3 provides that:

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
 - (a) to understand the information relevant to the decision,
 - (b) to retain that information,
 - (c) to use or weigh that information as part of the process of making the decision, or
 - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

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- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
- (a) deciding one way or another, or
 - (b) failing to make the decision

The MCA Code of Practice refers to a two-stage capacity test, however, the Supreme Court's decision in *JB v A Local Authority* [2021] UKSC 52 confirms the appropriate 3 stage test which should now be applied;

- (1) Functional: Is the person able to make a decision? If they cannot:
- (2) Impairment: Is there an impairment or disturbance in the functioning of the person's mind or brain? If so:
- (3) Causation: Is the person's inability to make the decision because of the identified impairment or disturbance?

In all cases all three elements of the above test must be satisfied in order for a person properly to be said to lack capacity for purposes of the MCA 2005

The Functional Test

(1) Is the person able to make a decision?

Broadly speaking, a person is able to make a decision if they have a general understanding of what decision they need to make, why they need to make it and the likely consequences of making, or not making, the decision.

As outlined above Section 3(1) states that P is unable to make a decision for himself if he is unable to:

- understand the information relevant to the decision; or
- retain that information; or
- use or weigh that information as part of the process of making the decision; or
- communicate his decision (whether by talking, using sign language or any other means).

Impairment

(2) Is there an impairment or disturbance in the functioning of the person's mind or brain?

The impairment or disturbance in the functioning of the mind or brain can be temporary or permanent, and the MCA Code gives some examples of what may amount to an impairment or disturbance in the functioning of the mind or brain. can include confusion, drowsiness, concussion, and the symptoms of drug or alcohol as well as formally diagnosed conditions. This is sometimes referred to as the 'diagnostic test' but this a little misleading, as a formal diagnosis is not always necessary, as long as there is clear evidence that there is an impairment or disturbance.

Causation

(3) Is the person's inability to make the decision because of the identified impairment or disturbance?

It is not sufficient to simply say that the person has a disturbance or impairment of mind, the assessor has to show why and how the disturbance or impairment of mind is causing the inability to make the decision(s) in question. This is sometimes referred to as the 'causal nexus'.

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Assessing Capacity for Social media

Decisions around accessing social media are becoming increasingly common alongside technological developments. This is beginning to present within social and health care situations more frequently and whilst this is a developing area in terms of case law development, there has been some guidance and direction provided through case law as detailed below.

When faced with assessing someone around this area and where there may be restrictions on usage as part of a best interests analysis, this could potentially have an impact on others in shared living environments which needs to be taken into consideration. Please be mindful of how this may also impact on others who may be sharing the residency.

As with all capacity related decisions, the worker will need to identify whether the care arrangements in their totality amount to a **deprivation of the persons' liberty** and if so, take the required steps to ensure this is **authorised appropriately**. They will need to demonstrate that the care arrangements are necessary and proportionate to support the person and use a balance table analysis to evidence how this decision has been reached. This is important both now and when the **Liberty Protection Safeguards** are in place.

General information

The salient information needs to be relevant to the personal situation in each circumstance. For example, when assessing capacity around sexual relations where it is a same sex relationship or regarding a woman over childbearing age, the risk of pregnancy may not be required to be understood. The same person centred considerations need to be applied in other circumstances e.g.: things of particular relevance around residency may differ from one person to the next for example being able to have a pet in a Care Home may be pivotal for one person or of no relevance to the next. The salient information is a guide for workers to apply and to consider they have provided suitable information considered by case law to be relevant in order to assess capacity. They should be able to represent how they have done so in the body of their assessment.

“As practitioners and indeed as judges we must be vigilant to ensure that the applicable tests do not become a tyranny of sameness, in circumstances where they are capable of being applied in a manner that may properly be tailored to the individual’s situation. To do otherwise would, for the reasons I have set out, lose sight of the key principles of the MCA 2005.”

HAYDEN J Para 66 <https://www.bailii.org/ew/cases/EWCOP/2019/27.html>

Salient information

The content in this section has been borrowed from Essex Chambers' Guidance Note: Relevant Information For Different Categories Of Decisions, November 2021. To check for any updates please see [Essex Chambers MCA Guidance Note](#). The relevant information is (described in the terms that would be applicable in assessing a person with learning disability):

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(a) That information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know, without you knowing or being able to stop it.

(b) That It is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites. The precise details or mechanisms of the privacy settings do not need to be understood but should be capable of understanding that they exist and be able to decide (with support) whether to apply them.

(c) If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended. 'Sharing' in this context has the same meaning as in 2018 Government Guidance: 'Indecent Images of Children: Guidance for Young people': that is to say, "sending on an email, offering on a file sharing platform, uploading to a site that other people have access to, and possessing with a view to distribution. 'rude or offensive' is used here as "these words" may be easily understood by those with learning disabilities as including not only the insulting and abusive, but also the sexually explicit, indecent or pornographic;"

(d) Some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly;

(e) Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm;

(f) If you look at or share extremely rude or offensive images, messages, or videos online you may get into trouble with the police, because you may have committed a crime. 'Sharing' has the same meaning as above; see above also in relation to 'rude or offensive.' This statement "is not intended to represent a statement of the criminal law, but is designed to reflect the importance, which a capacitous person would understand, of not searching for such material, as it may have criminal content, and/or steering away from such material if accidentally encountered, rather than investigating further and/or disseminating such material. Counsel in this case cited from the Government Guidance on 'Indecent Images of Children'. Whilst the Guidance does not refer to 'looking at' illegal images as such, a person should know that entering into this territory is extremely risky and may easily lead a person into a form of offending. This piece of information is obviously more directly relevant to general internet use rather than communications by social media, but it is relevant to social media use as well."

Not relevant is the information that internet use may have a psychologically harmful impact on the user:

'It is widely known that internet-use can be addictive; accessing legal but extreme pornography, radicalisation or sites displaying inter-personal violence, for instance, could cause the viewer to develop distorted views of healthy human relationships, and can be compulsive.

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Such sites could cause the viewer distress. I take the view that many capacitous internet users do not specifically consider this risk, or if they do, they are indifferent to this risk. I do not therefore regard it as appropriate to include this in the list of information relevant to the decision on a test of capacity under section 3 MCA 2005.' (Re A (Capacity: Social Media and Internet Use: Best Interests) [2019] EWCOP 2 at para 30 per Cobb J)

Particularly relevant case law examples can be found at: [39 Essex Chambers | COP Cases – 39 Essex Chambers](#). In Fkey word search select 'Social Media'

Please remember that interpretation of case law can change over time. Workers should check for any significant changes to case law since this guidance has been written. For additional advice please contact your own organisation's MCA lead and/or legal department

Key Helpful documents

Please see the MCA Code of Practice

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

Essex Chambers Assessing Mental Capacity Guidance notes:

<https://www.39essex.com/mental-capacity-guidance-note-assessment>

Essex Chambers Best Interests Guidance notes: <https://www.39essex.com/mental-capacity-guidance-note-best-interests/>

Other links which may be of use

Please see the MCA Code of Practice

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

Essex Chambers (Case law updates) - brilliant for easy read summaries. Has a key word search which is useful [Mental Capacity Resource Centre | 39 Essex Chambers](#)

Advocacy Focus (Lots of easy read information you may find useful):

<https://www.advocacyfocus.org.uk/justiceforlb>

Lancashire Self Neglect Framework link:

<http://www.lancshiresafeguarding.org.uk/lancashire-safeguarding-adults/what-is-safeguarding-and-abuse/self-neglect.aspx>

Office of the Public Guardian (OPG)

Find out if someone has a registered attorney or deputy

<https://www.gov.uk/government/publications/search-public-guardian-registers>

Lasting Power of Attorney <https://www.lastingpowerofattorney.service.gov.uk/home>

References

Allen N et al (2022), A Brief Guide to Carrying out Capacity Assessments, Accessed from , [\(Mental-Capacity-Guidance-Note-Capacity-Assessment-January-2022.pdf \(39essex.com\)\)](#) Date accessed 15.11.22).

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Mental Capacity Act Code of Practice <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice> (Date accessed 15.11.22)

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