



MCA Guidance Sexual Relations

Grab sheet guidance and links to support practitioners
when undertaking capacity assessments relating to
sexual relations decisions

Blackburn with Darwen



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SEXUAL RELATIONS DECISIONS MCA GUIDANCE NOTES

GRAB SHEET MENTAL CAPACITY ACT GUIDANCE DOCUMENTS: SEXUAL RELATIONS

This grab 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.

(Please also read grab sheet guidance on CONTACT in conjunction with this guidance.)

Please see the below information and links which may help you when undertaking a capacity assessment around **sexual relations** decisions. Please note and pay particular attention to the relevant Case Law and what has now been determined by the Courts as being salient 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, consideration as to whether 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 interest decision needs to be concluded, there may be some situations where with time, additional information/education, the person could be able to demonstrate capacity at a later date. This is particularly important when assessing capacity around life changing or intimate decisions such as sexual relations.

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.

Assessing capacity (MCA Code of Practice Page 41)

Anyone assessing someone's capacity to make a decision for themselves should use the **two-stage test of capacity**.

- Does the person have **an impairment** of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works? (It doesn't matter whether the impairment or disturbance is temporary or permanent.)
- If so, does **that impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made?**

Assessing ability to make a decision

- Does the person have a general understanding of what decision they need to make and why they need to make it? Does the person have a **general understanding** of the likely consequences of making, or not making, this decision?
- Is the person able to understand, **retain, use and weigh up** the information relevant to this decision?
- Can the person **communicate** their decision (by talking, using sign language or any other means)? Would the services of a professional (such as a speech and language therapist) be helpful?

Assessing capacity for sexual relations: Sex – COP Indicated – cannot make best interest decision

This guidance looks at capacity to consent to **sexual relations**. You will note the strong emphasis being around the mechanics of sex rather than the person specific element i.e..the contact element. Therefore this is broken into two distinct areas of 1) mechanics of sex and 2) contact. Workers need to be clear around this when undertaking assessments in this area. It is also worth noting that we **cannot make a best interest decision** around sex should the person lack capacity. A situation which addresses this decision needs to be managed within Court of Protection where a person is assessed as lacking capacity.

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.

It is important that workers are familiar with the salient information for this decision and address this specifically within the capacity assessment. Please seek legal advice. Essex Chambers' advice on what is considered to be salient information is outlined below. Workers must take into account the specifics of each individual's circumstances for example as detailed in paragraph 'c' below.

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 child bearing 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 assessment of whether a person has the capacity to consent to sexual relations is an assessment that looks at their general capacity to consent to sex, rather than being specific to any particular person or any particular occasion.'

When judging that general capacity to enter into sexual relations, the relevant information for the purposes of making an assessment is whether the person can understand:

(a) The mechanics and nature of the sexual act;

(b) The risk of sexually transmitted infections. The knowledge required is fairly rudimentary. “In my view it should suffice if a person understands that sexual relations may lead to significant ill-health and that those risks can be reduced by precautions like a condom.” Nothing more than this is required. There is thus no need to be able to name and describe each, or indeed any, potential infection, nor must a person specifically be able to understand condom use (this is an example of a precaution)

(c) The potential that sexual activity between a man and a woman can give rise to pregnancy, although note that where it is clearly established that the person is homosexual, it is ordinarily unnecessary to consider this since pregnancy is not a foreseeable consequence of homosexual sex;

(d) A basic understanding of contraception;

(e) That one has a choice whether to have sex and can refuse. The person must understand that they can change their mind in relation to consent to sex at any time leading up to and during the sexual act. **NB. Where there is a known history of sexual offences, this area of assessment must consider weighing their ability to determine consent from another person.**

The assessment must not however entail consideration of the following elements, should they be present in any particular case:

(a) The identity of the sexual or marriage partner. In other words, capacity to consent to sexual relations is act-specific, rather than person-specific.

(b) An understanding of what is involved in caring for a child (should a protected person become pregnant). This comes close to crossing the line into a paternalist approach that would find incapacity on the basis that a decision is simply unwise.

(c) The risk that may be caused to herself through pregnancy, or the risk to future children. The social, emotional and psychiatric consequences of falling pregnant or those attaching to the children arising from such a pregnancy cannot be part of the relevant information informing the decision of whether a protected party has the capacity to consent to sex or marriage.

(d) The fact that the opportunity for sexual relations with a specific partner will be limited for some time to come into the future.

(e) The ability to understand or evaluate the characteristics of some particular partner or intended partner.

Finally, the Courts have emphasised that, when it comes to making decisions to consent to sexual relations with another person, a person of full capacity may act from a more intuitive than cerebral set of factors. The case law (IM) reminds us that “The notional process of using and weighing information attributed to the protected person should not involve a refined analysis of the sort which does not typically inform the decision to consent to sexual relations made by a person of full capacity.” In other words, there should not be a higher threshold for a person with allegedly impaired capacity to consent to sexual relations than exists for an “ordinary” person (whoever they might be).’

Particularly relevant case law in this area can be found at:

https://www.39essex.com/?s=sexual+relation&post_type=cop_cases

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.

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://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp->

[content/uploads/2017/11/Mental-Capacity-Guidance-Note-Capacity-Assessment-March-2019.pdf](https://www.39essex.com/content/uploads/2017/11/Mental-Capacity-Guidance-Note-Capacity-Assessment-March-2019.pdf)

Essex Chambers Best Interest Guidance notes:

<https://www.39essex.com/mental-capacity-guidance-note-best-interests-april-2019/>

Other links which may be of use

Lancashire Safeguarding Adult Board: Lots of resources on here, well worth a look.

<http://www.lancshiresafeguarding.org.uk/lancashire-safeguarding-adults/resources/mca-dols.aspx>

<http://www.lancshiresafeguarding.org.uk/lancashire-safeguarding-adults/policies-and-procedures.aspx>

Essex Chambers (Case law updates) - brilliant for easy read summaries. Has a key word search which is useful: www.39essex.com

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

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

CQC info when MCA not complied with:

<https://www.communitycare.co.uk/2010/06/17/professionals-fail-to-comply-with-mental-capacity-act/>

Lancashire Self Neglect Framework Link... framework launch was 20.03.19 so still very new:

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

OPG link re LPA Stuff and OPG 100 forms... OPG have recently updated some of their forms:

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

<https://www.lastingpowerofattorney.service.gov.uk/home>

References

Allen N et al (2019), A Brief Guide to Carrying out Capacity Assessments, Accessed from

<https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2017/11/Mental-Capacity-Guidance-Note-Capacity-Assessment-March-2019.pdf>

(Date accessed 10.11.19)

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

(Date accessed 31.10.19)