

Leicester, Leicestershire and Rutland ‘How to’ assess Mental Capacity in specific situations

How to: Assess mental capacity for internet and social media use

The importance of access to electronic and digital technology for people with disabilities is enshrined with the UN Convention on the Rights of Persons with Disabilities 2006. However, it is widely recognised that the internet can be a dangerous place and there is considerable scope for harassment, bullying, sexual grooming, exploitation, encouragement of self-harm and exposure to generally harmful content. Adults at risk are particularly susceptible to these online harms, which pose significant safeguarding concerns. These concerns may therefore trigger an assessment of a adult’s capacity to make decisions about internet and social media use.

The presumption of mental capacity and practicable steps

The starting point of the MCA is to presume a person has mental capacity to make a decision, including consenting to or refusing the intervention/assessment. Before concluding that a person lacks mental capacity to decide, it is important to take all practical and appropriate steps to enable the person to make the decision themselves (2nd principle of the MCA). Chapter 3 of the MCA Code of Practice gives detailed guidance on the steps that could be taken to support a person make a decision for themselves including: providing relevant information, communicating in an appropriate way, making the person feel at ease and supporting the person.

In relation to internet and social media use, it is important to remember that capacity can be acquired, following a tailored programme of education and training.¹ Wherever possible, the professional carrying out the capacity assessment should use props and visual aids to support decision-making. This could include for example, using the adult’s preferred device as a prop and referring to screenshots of their preferred social media platforms, websites and browsing history.

Relevant information

In the case of [A \(Capacity: Social Media and Internet Use: Best Interests\) \[2019\] EWCOP 2](#), the Court of Protection was asked to decide whether a man with a learning disability had capacity to make decisions about internet and social media use. The judge stressed the importance of distinguishing capacity for engaging in social media for the purposes of online contact from other forms of contact, or general issues surrounding care. He also decided that capacity to use the internet and social media are ‘*inextricably*’ linked and it is therefore ‘*...impractical and unnecessary to assess capacity separately in relation to using the internet for social communications as to using it for entertainment, education, relaxation, and/or for gathering information.*’² The judge identified the relevant information which a person needs to be able to understand, retain, and use and weigh, as the following:

- *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.*
- *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 (there is no expectation that the person understands the precise details or mechanisms of the privacy settings).*
- *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 (this includes: forwarding an email, uploading to a file-sharing platform, uploading to a site that other people have access to, and possessing with a view to distributing).*

¹ Examples include: [Staying Safe on social media and online \(Foundation for people with learning disabilities\); SafeSurfing: internet safety training \(Mencap\)](#) & [Protective Behaviours - Online safety and learning disabilities video \(Northamptonshire Healthcare NHS Foundation Trust\)](#)

² See paragraphs 25-26

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- *Some people you meet or communicate with 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.*
- *Some people you meet or communicate with online, 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.*
- *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.*

The judge did not include as relevant information the fact that internet use can be addictive or otherwise harmful, noting that many capacitated people either don’t consider or are indifferent to, this risk. Another useful case that highlights issues around the use of social media is [Re B \(Capacity: Social media: care and contact\) \[2019\] EWCOP 3](#).

Carrying out the assessment

A capacity assessment is a dynamic process of providing the relevant information to the person and then asking the person questions to assess their ability to understand, retain, use or weigh that information, and communicate their decision. It may be necessary to provide the relevant information more than once and in different formats. For example, if a person doesn’t understand something the first time, it would be appropriate to explain it in a different way using a different method. It may therefore be necessary to assess capacity over more than one visit.

It is fundamental to the assessment process that the person is informed of the purpose of the assessment.³ This could, for example, involve informing the adult that there are concerns that their online activity is placing them at risk of harm and that you need to check that they are making informed decisions about internet and social media use.

Understanding the relevant information

The case law is clear that *‘It is not necessary for a person to demonstrate a capacity to understand and weigh up every detail of the respective options, but merely the salient factors.’*⁴ Similarly, assessors *‘...must guard against imposing too high a test of capacity...because to do so would run the risk of discriminating against people suffering from a mental disability.’*⁵

After giving the adult **the relevant information (see the box on the first page)**, potential questions to ask to assess the person’s ability to understand it could include:

- *Is it a good idea or bad idea to put your address and phone number on your profile (ask the person to explain their answer)?*
- *Is it a good idea or a bad idea to accept a friend request from someone you don’t know (ask the person to explain their answer)?*
- *Can other people see photos/videos that you post?*
- *How do you stop images/videos/posts from being seen by strangers?*
- *Can you stop a friend from sharing a message or image you have posted (on Facebook/Instagram etc)?*
- *Can you show me how to block/unfriend someone?*
- *Can you show me how to turn privacy & location settings on/off?*
- *Have you ever sent/posted images or videos that upset another person? Why do think they were upset?*

³ Paragraphs 47-49 of [LB Wandsworth v M & Ors \[2017\] EWHC 2435](#)

⁴ Paragraphs 22 & 69 of [KK v STCC \[2012\] EWCOP 2136 \[2012\]](#)

⁵ Paragraph 16 of [PH v A local authority \[2011\] EWCOP 1704](#)

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- *Have you ever sent/posted a message that upset another person? Why do you think they were upset?*
- *Is it possible that a person you met online is not actually who they say they are? If so, why do you think they are pretending to be somebody else?*
- *Is it possible that a person you met online might want to harm you? If so, how?*
- *What kind of images/videos/messages could get you into trouble with the Police?*

Depending upon the adult's answers to the above questions, you may need to ask further probing questions or explain the relevant information in a different way. If the person struggles to understand your questions or has communication difficulties limiting their ability to answer open questions, it would then be appropriate to switch to closed questions requiring a yes or no response. For example:

- *Can images and videos you put online be shared with strangers?*
- *Can your messages/posts be shared with strangers?*
- *Do privacy & locations settings stop images and videos from being shared with strangers?*
- *Could a person you chat to online lie about themselves?*
- *Could an online friend try and trick you (refer to a specific person, particularly if there are safeguarding concerns about them)?*
- *Is everyone you chat to/meet online your friend?*
- *Could a person who is nice to you online be a bad person (refer to a specific person, particularly if there are safeguarding concerns about them)?*
- *Could a person you chat to online, want to harm you or take advantage of you?*
- *Are you allowed to send threatening or abusive messages (e.g. threatening to hurt someone who has upset or annoyed you)?*
- *Could you get into trouble with the Police if you look at or share extremely rude or offensive pictures/videos online (give examples)?*
- *Could you get into trouble if you took a picture of your private parts and sent it to someone you met online?*

It is important when asking closed questions to check the consistency of the person's replies. This could be achieved by asking the following true or false questions, for example:

- *Images or videos you put online are private and can't be shared with strangers.*
- *The messages you send to your friends are private and can never be shared with strangers.*
- *Privacy settings can help stop images and videos from being shared with strangers.*
- *Location settings can help stop strangers knowing where you are.*
- *People you chat to online always tell the truth about themselves.*
- *An online friend would never lie to you or try to trick you (refer to a specific person, particularly if there are safeguarding concerns about them).*
- *A person you chat to/meet online is always a friend.*
- *A person who is nice to you online is always a good person (refer to a specific person, particularly if there are safeguarding concerns about them)?*
- *A person that you chat to online might want to harm you e.g. by telling you to give them money or telling you to send them a picture of your private parts.*
- *You might get into trouble with the Police if you send threatening or abusive messages to a person who has upset or annoyed you.*

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- *Some pictures and videos are illegal and you could get into trouble with the Police if you view or share them (give examples).*
- *You wouldn't get into trouble if you took a picture of your private parts and sent it to a friend.*

Retaining the relevant information

Section 3(3) of the Mental Capacity Act 2005 states that ‘*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.*’ Therefore, if information can be retained long enough for the adult to make the decision, that is sufficient, even if they cannot then retain that information for a longer period.

To assess the adult's ability to retain information, it is likely that the same methods and tools used to provide the relevant information and assess understanding will need to be used again. For adults' who have good verbal communication, it would be appropriate to ask them to recite the key points of the relevant information. For adults' with communication difficulties, it would be appropriate to use written words or visual aids to establish whether the person recalls the key information a short while after it has been provided.

Use or weigh the relevant information

This part of the assessment will build upon questions asked to assess the person's understanding of the relevant information. The aim is to determine whether the person is ‘...**able to employ the relevant information in the decision-making process and determine what weight to give it relative to other information required to make the decision.**’⁶ It is therefore necessary for the adult to be able to **apply the relevant information** to themselves and balance the benefits and harms of internet and social media use. Another way of putting it is, can the person having understood the information, take account of it?

To assess the adult's ability to use or weigh information, questions should aim to find out how they make decisions about engaging with the internet and social media and what factors they take into account. Equally important are the values that influence how they weigh up information. This is particularly important if the adult is placing themselves at risk through their online activity. Potential questions to ask include:

- *How do you keep yourself safe online?*
- *Why do you think others are concerned about your contact with X (a person the adult met online)?*
- *Why do you think others are concerned about you using the internet/Facebook/Snapchat etc?*
- *What do you enjoy about using the internet (refer to specific websites or social media platforms? What do you dislike?*
- *Has someone you met online ever asked you to do something that is illegal? What happened? Why did you make that particular choice?*
- *Has someone you met online ever asked you to do something that made you feel uncomfortable? What did you decide to do? Why?*
- *How would you feel about having someone sitting with you whilst you use the internet (e.g. support worker)? What would the advantages/disadvantages be?*
- *X person (a person the adult met online and poses a risk to them) is actually Y person – why do you think they are pretending to be somebody else?*
- *How could X person (a person the adult met online and poses a risk to them) try to harm you?*
- *What would you do if a person you met online asked for your phone number?*
- *What would you do if a person you met online wanted to meet you in person? If you agreed to meet, how would you keep yourself safe?*

⁶ See paragraph 38 of [Kings College Hospital NHS Trust v C and V \[2015\] EWCOP 80](#)

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- What would you do if someone you met online asked you to send them money?
- What would you do if someone you met online asked you to send them a picture of your private parts?
- What would you do if someone you met online sent you a picture of their private parts (or other potentially illegal content)?

There are two common areas of difficulty in assessing whether a person can use or weigh information. The first is where a person denies factual information about a situation. For example, denying or refusing to accept that they have been the victim of ‘mate’ crime or refusing to accept that a person that they met online might want to deceive or harm them. Here it is important to ensure that the evidence of harm is presented objectively, to support the person’s acceptance of it (e.g. providing documentary evidence where appropriate). If denial persists, it may be necessary to then respectfully question or challenge false beliefs or assumptions. If the person continually refutes the evidence, then this would indicate an inability to use or weigh relevant information. Conversely, if the adult at risk accepts the relevant information, the weight they attach to that information is a matter for them and will depend on their own values or outlook.⁷ This may result in the adult at risk making an unwise but capacitated decision.

The second area of difficulty is where the person gives coherent answers to questions but is then unable to translate their intentions into actions due to executive dysfunction. The person says one thing but then does something else in practice. Executive functioning was recently described by a judge as, ‘...the ability to think, act, and solve problems, including the functions of the brain which help us learn new information, remember and retrieve the information we’ve learned in the past, and use this information to solve problems of everyday life.’⁸

It may be necessary to gather further collateral information and ask further probing questions if there appears to be a mismatch between a person’s words and their actions. It would be legitimate to conclude that a person lacks capacity to make a decision if they are unaware of, or deny the fact that they cannot implement their stated intentions, or deny that when needed they are unable to bring to mind the information needed to implement a decision (e.g. due to impulsivity). However, it would only be legitimate to reach such a conclusion where there is clearly documented evidence of repeated mismatch.⁹ For example, if a adult, who understands the relevant information and is otherwise able to use or weigh it during the assessment, impulsively accesses extreme pornography or illegal content online, it would be appropriate to ask the person the reasons why and explore the mismatch between their words and actions. If they are aware of and accept their difficulties and the associated risks, but choose to continue to access the illegal content, then this would be deemed an unwise decision rather than a lack of capacity.

Communicate the decision

To have capacity make decisions about internet and social media use, the adults needs to have a method of communication that is consistent and reliable enough to respond to questions and eliminate any ambiguity. This is an area where it is particularly important to show that you have taken practicable steps to facilitate communication. For example, reproducing as best as possible the manner by which they usually communicate, providing all necessary tools and aids, and enlisting the support of carers, friends or professionals who may be able to facilitate communication.

After the assessment

Reflect upon the following points:

⁷ See paragraph 38 of [Kings College Hospital NHS Trust v C and V \[2015\] EWCOP 80](#)

⁸ See paragraph 39 of [A Local Authority v AW \[2020\] EWCOP 24 \(20 May 2020\)](#)

⁹ [39 Essex Street - Carrying out and recording capacity assessments \(June 2020\)](#)

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- Do you have enough information to displace the presumption of capacity?
- Do you need to carry out further visits to make a judgement?
- Remember the assessment of mental capacity is made on the balance of probabilities.
- Have you established the causative nexus (e.g. the causal link between inability to decide and the identified impairment of or disturbance in functioning of the mind or brain)? A formal diagnosis is not required.

Outcomes

1. The person has mental capacity to make decisions about internet & social media use

That is the end of the MCA at this point. Staff can still support and provide advice and guidance, but the person makes their own decisions about internet & social media use. Mental capacity can be fluid however, so it may be appropriate to re-assess a person's mental capacity as new situations arise or the person's condition changes. If the person is accessing illegal content and/or their actions pose a risk to other people (children and adults), then the police should be consulted at the earliest opportunity.

2. The person lacks mental capacity to make decisions about internet & social media use

A best interests decision is then required. Where you are proposing to limit or supervise access to the internet, you must seek further guidance from your line manager. If any of the people involved (including the person lacking mental capacity) are unhappy with any of the proposed restrictions, further legal advice should be sought for consideration of an application to the Court to Protection.