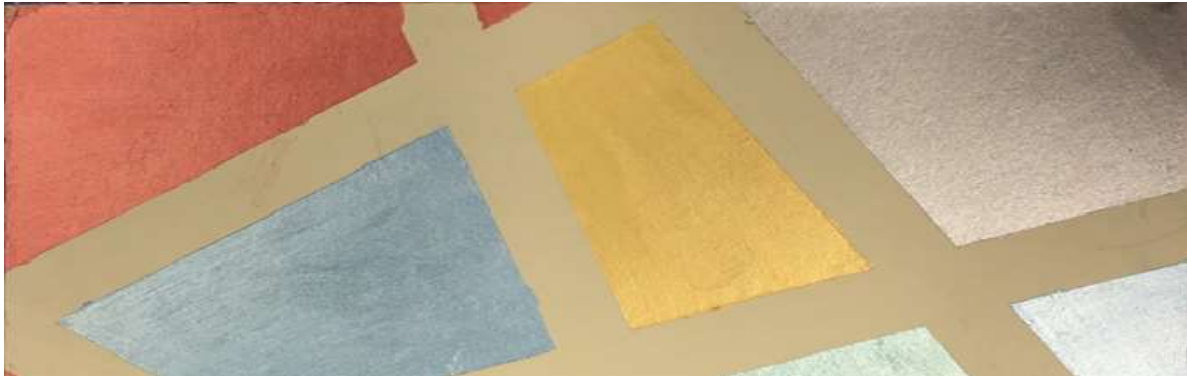




A: Introduction

1. There are two Codes of Practice to the Mental Capacity Act 2005, one for the main body of the Act, and one for the Deprivation of Liberty Safeguards. They are statutory Codes: they have been approved by Parliament, and the MCA 2005 requires certain people to have regard to them. Those people include anyone acting in a professional capacity. Neither Code of Practice has ever been updated since they were published, the main Code in 2007, and the DoLS Code in 2009. They are both out of date in significant ways. As part of the coming into force of the Mental Capacity (Amendment) Act 2019, we had anticipated that there would be a new Code published which would (in one place) update the main MCA Code and give guidance as to the operation of the Liberty Protection Safeguards. However, the LPS have been delayed and, whilst we anticipate that there will be a consultation on the draft Code in 2022 (hopefully relatively early in 2022), it appears likely that professionals will be stuck operating two out of date Codes for some time.
2. Whilst professionals have to have regard to the Codes, they can – and should – depart from them where they have been superseded by case-law which makes clear what the Act itself, the source of the law,¹ means. We have therefore prepared this **entirely unofficial** guide to those parts of the two Codes which are most obviously out of date. There are many other places (for instance scenarios in the main Codes) which might jar with practical experience gained since the MCA 2005 came into force, but we do not cover these here.

Editors

Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen

Disclaimer: This document is based upon the law as it stands as at February 2022; it is intended as a guide to good practice, and is not a substitute for legal advice upon the facts of any specific case. No liability is accepted for any adverse consequences of reliance upon it.

The picture at the top, “Colourful,” is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

¹ See *SBC v PBA and Others* [2011] EWHC 2580 (Fam) at paragraph 67, and also *NHS Trust v Y* [2018] UKSC 46 at paragraph 97.

B: The main MCA Code

4. References to paragraphs in this section are to paragraphs in the main Code of Practice.
5. **Paragraph 2.1.** The statutory principles first aim to empower the person to decide the matter for themselves (not, as currently stated, to protect people who lack capacity).
6. **Paragraph 2.3.** The discussion of the presumption of capacity needs to be read subject to this important judicial statement:

The presumption of capacity is important; it ensures proper respect for personal autonomy by requiring any decision as to a lack of capacity to be based on evidence. Yet the section 1(2) presumption like any other, has logical limits. When there is good reason for cause for concern, where there is legitimate doubt as to capacity [to make the relevant decision], the presumption cannot be used to avoid taking responsibility for assessing and determining capacity. To do that would be to fail to respect personal autonomy in a different way.²

7. **Paragraphs 4.3:** the order of “This means that” needs to be reversed as per below.
8. **Paragraphs 4.10-4.15 (and cross-references such as 4.46).** The Code is wrong when it says that there is a two-stage test for determining capacity, starting with the question of whether the person has an impairment or, or disturbance, in the functioning of their mind or brain. The Supreme Court in *A Local Authority v JB* confirmed, however, that it is necessary to start with the second stage in the Code: i.e. whether the person is functionally able to make the decision.³
9. **Paragraph 4.19.** The Code only refers to the foreseeable consequences that the person must be able to understand, retain, use and weigh by reference to consequences for the person. The Supreme Court in *A Local Authority v JB* confirmed, however, that those reasonably foreseeable consequences can include not just the consequences for the person but also, where relevant, the consequences for others.⁴
10. **Paragraph 4.23.** The Code suggests that the ‘communication’ limb of the capacity test should only be used for the situation where the person who cannot communicate their decision at all. This remains its primary purpose, and the communication limb should not be relied upon if the assessor identifies that the person is unable to understand, retain, use or weigh the relevant information, as at that point the person has made no decision to communicate. However, research shows that the courts have broadened the criterion also to include the situation where the person is unable to express a stable preference:⁵ in such a situation, the assessor does not have access

² *Royal Bank of Scotland Plc v AB* [2020] UKEAT 0266_18_2702. The judgment relates to capacity to conduct proceedings before the Employment Tribunal, but the principles are of broader application.

³ See *A Local Authority v JB* [2021] UKSC 52 at paragraph 79. See also our capacity guide.

⁴ See *A Local Authority v JB* [2021] UKSC 52 at paragraph 73.

⁵ Note, **inability** to express a stable preference is different to being **able** to, but **unwilling**. See our capacity guide.

to the person's real choice.

11. **Paragraphs 4.26-4.27.** The discussion of fluctuating capacity conflates temporary incapacity which can be resolved by taking steps to support the person and genuinely fluctuating capacity. Our [capacity guide](#) addresses how the courts have approached the situation of genuinely fluctuating capacity.
12. **Paragraphs 5.5-5.7 and 5.13.** The discussion of best interests has to be read subject to the decision of the Supreme Court in *Aintree v James* [2013] UKSC 67, in particular Lady Hale's emphasis (at paragraph 45) that the "*purpose of the best interests test is to consider matters from the [person's point of view.*" See also our [best interests](#) guide, which sets out how the courts approach questions of best interests.
13. **Paragraphs 6.8-6.14.** The Code's discussion of the operation of s.5 MCA 2005 in the context of moves of residence needs to be read subject to (1) subsequent case-law about the limits of s.5 in this context (discussed [here](#)); and (2) the operation of the Deprivation of Liberty Safeguards where these apply.
14. **Paragraphs 6.18-6.19.** The discussion of when applications are required in the context of medical treatment is no longer accurate. The position is now summarised in the [Serious Medical Treatment Guidance](#) issued by the Vice-President of the Court of Protection, on an interim basis pending the production of a revised Code.
15. **Paragraphs 6.49-6.53.** The discussion of deprivation of liberty is now significantly out of date. A summary of the current position can be found [here](#).
16. **Paragraphs 8.24.** The discussion of when applications are required in the context of medical treatment is no longer accurate. The position is now summarised in the [Serious Medical Treatment Guidance](#) issued by the Vice-President of the Court of Protection, on an interim basis pending the production of a revised Code.
17. **Paragraph 8.38.** The Code is wrong when it says that personal welfare deputies will only be appointed in the most difficult cases. The correct position was set out in *Re Lawson, Mottram and Hopton, Re (appointment of personal welfare deputies)* [2019] EWCOP 22, namely that (1) each case falls to be decided on its merits, and by reference to whether an appointment is in the best interests of P; (2) P's wishes and feelings will form an aspect of that decision (for instance if it is clear that P would wish a family member to be appointed to be their personal welfare deputy); and (3) the proper operation of s.4 and s.5 MCA 2005 means that, in practice, personal welfare deputies will not often be appointed, in particular because the appointment should not be seen, in and of itself, as less restrictive of P's rights and freedoms.
18. **Chapter 13.** The chapter relating to the interface between the MCA 2005 and the MHA 1983 pre-dates the introduction of the Deprivation of Liberty Safeguards and Schedule 1A to the MCA 2005

and is therefore of only limited use. More recent statutory guidance in relation to the interface can be found in Chapter 13 of both the [English Code of Practice to the MHA 1983](#) and the [Welsh Code of Practice to the MHA 1983](#). An overview of the interface can be found [here](#).

C: The DoLS Code of Practice

19. References to paragraphs in this section are to paragraphs in the [DoLS Code of Practice](#).
20. **Paragraphs 2.1-2.24.** The discussion of deprivation of liberty is now significantly out of date. A summary of the current position can be found [here](#).
21. **Paragraphs 3.2-3.3** (and cross-references). The discussion of authorising deprivation of liberty is out of date in terms of the identity of supervisory bodies in England in respect of hospital DoLS, and also does not take account of the situations where authority cannot be provided by DoLS but needs to be sought from the Court of Protection (as to which, see this guidance [here](#)).
22. **Paragraph 4.9.** [Case-law](#) has made clear that the information that the person must be able to understand, retain, use and weigh for purposes of the capacity assessment includes the key elements of the arrangements for them which give rise to a confinement.
23. **Paragraphs 4.40-4.51.** The discussion of the interface between the MCA 2005 and the MHA 1983 needs to be read subject to the significant body of case-law decided subsequently. An overview of the case-law and the interface can be found [here](#).
24. **Paragraph 7.12.** The discussion of the selection of the Relevant Person's Representative needs to be read subject to the analysis of their role in [Re AJ](#) [2015] EWCOP 5.
25. **Paragraph 7.25.** The discussion of supporting and monitoring the Relevant Person's Representative needs to be read subject to [Re AJ](#) [2015] EWCOP 5, which clarifies the role of the supervisory body in terms of ensuring that the RPR is doing their job in terms of enabling the person to challenge their deprivation of liberty.
26. **Paragraph 10.2.** The discussion of applications to the Court of Protection needs to be read subject to [Re RD & Ors \(Duties and Powers of Relevant Person's Representatives and Section 39D IMCAS\)](#) [2016] EWCOP 49, which sets out a clear template for (1) identifying whether the person has capacity to make an application; and (2) what to do if they do not.

D: Useful resources

27. Useful free websites include:
 - www.39essex.com/resources-and-training/mental-capacity-law – database of guidance notes (including as to capacity assessment) case summaries and case comments from the monthly 39 Essex Chambers Mental Capacity Law Report, to which a free subscription can be obtained

by emailing marketing@39essex.com.

- www.mclap.org.uk – website set up by Alex with forums, papers and other resources with a view to enabling professionals of all hues to ‘do’ the MCA 2005 better.
- www.capacityguide.org.uk – a website which draws upon both this guidance and research conducted by the [Mental Health and Justice](#) project to give further assistance to those thinking about capacity, especially in more difficult situations.
- www.lpslaw.co.uk – a website set up by Neil which includes videos, papers and other materials relating both to the Liberty Protection Safeguards and the MCA 2005 more widely;
- www.mentalhealthlawonline.co.uk – extensive site containing legislation, case transcripts and other useful material relating to both the Mental Capacity Act 2005 and Mental Health Act 1983. It has transcripts for more Court of Protection cases than any other site (including subscription-only sites), as well as an extremely useful discussion list.
- www.scie.org.uk/mca-directory/ - the Social Care Institute of Excellence database of materials relating to the MCA.

Alastair Davidson

Senior Clerk

alastair.davidson@39essex.com

Sheraton Doyle

Senior Practice Manager

sheraton.doyle@39essex.com

Peter Campbell

Senior Practice Manager

peter.campbell@39essex.com

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON

81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER

82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR

#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

[For all our mental capacity resources, click here](#)